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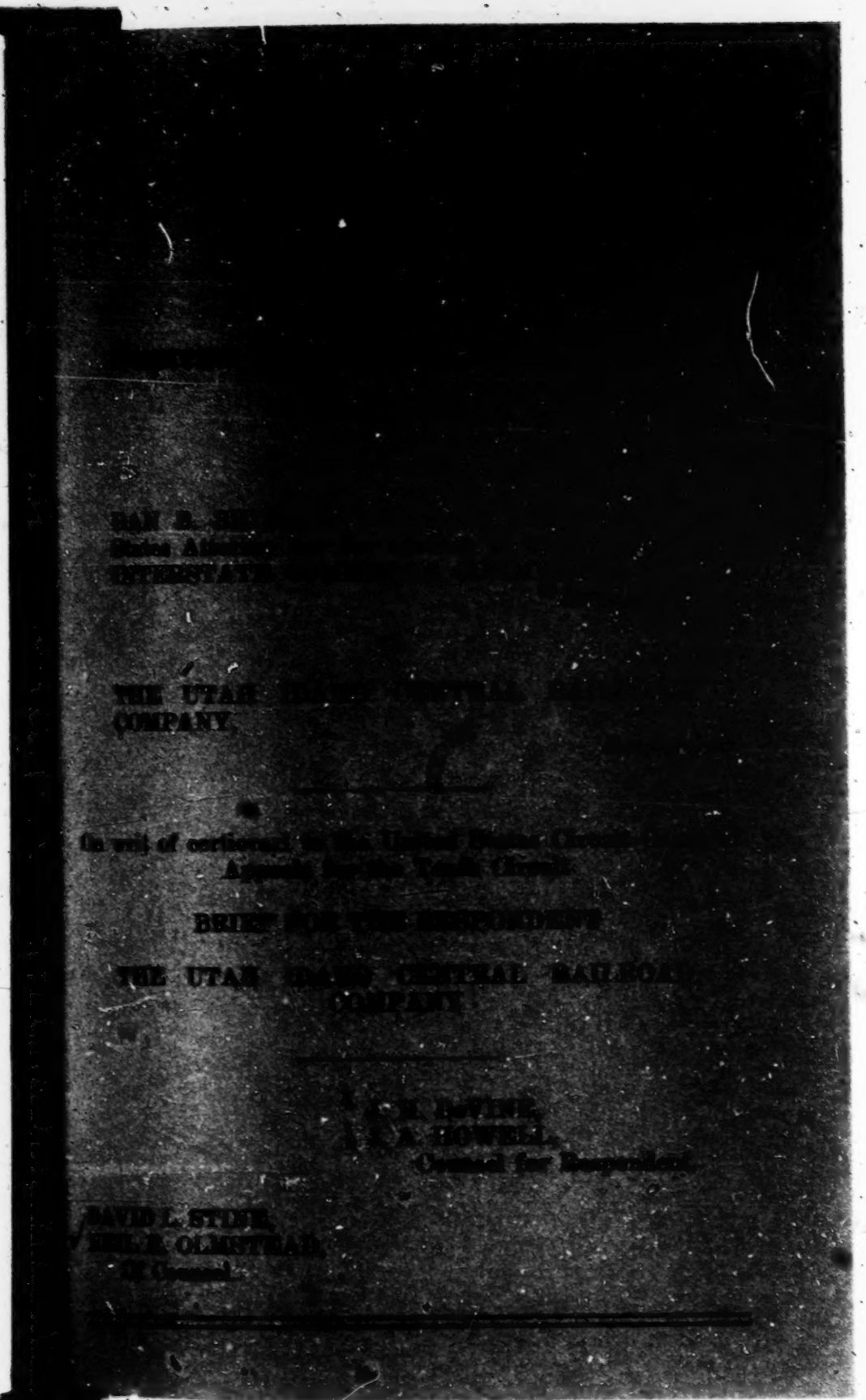

No. 28

IN THE

Supreme Court of the United States

October Term, 1938

DAN B. SHIELDS, Individually and as United States Attorney for the District of Utah, and the INTERSTATE COMMERCE COMMISSION.

Petitioners,

vs.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

On writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT

THE UTAH IDAHO CENTRAL RAILROAD COMPANY

J. H. DeVINE,
J. A. HOWELL,
Counsel for Respondent.

DAVID L. STINE,
NEIL R. OLMSTEAD,
Of Counsel.

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Respondent.

On writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT

THE ISSUES

As stated by counsel for petitioners in their brief, the respondent brought an action against the petitioner Dan B. Shields, Individually and as United States Attorney for the District of Utah, praying for an injunction to restrain him as such District Attorney from prosecuting respondent and its officers for failure to comply with the Railway Labor Act, respondent claiming that it is an interurban railroad exempt from the provisions of the Act, in accordance with the proviso contained in Section 1, First, reading as follows:

> "Provided, however, that the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce

> Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso;"

and that if it be subject to the Act then the same is unconstitutional as to it.

However, in order that the case may be presented properly from the point of view of the respondent, we deem it necessary to state more in detail the issues in the case than the same are stated in the brief of opposing counsel.

The amended bill of complaint of respondent alleged:

1. That respondent is a common carrier operating an interurban electric railroad between Ogden City in the State of Utah and the City of Preston in the State of Idaho, not a part of any general steam railroad system of transportation, or a part of the general steam railroad system of transportation operated by electric power, and as such exempt from the provisions of the Railway Labor Act, setting out in detail the facts in relation to its history and its physical characteristics, which show it to be an interurban railroad, which facts will hereinafter in a synopsis of the evidence be stated more in detail. (R. 24.)

2. That Paragraph Eighth of Section 2 of said Act provides that:

> "Every carrier shall notify its employes by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employes will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth and fifth paragraphs of this Section;"

that said Mediation Board has prescribed the form of the notices and the times and places at which the same shall be posted by the respondent and, notwithstanding the respondent is exempt from the provisions of said Act, has ordered the respondent to post such notices to its employes, and that re-

spondent has refused to comply with that order, and has not posted such notices. (R. 23.)

3. That the petitioner, Dan B. Shields, threatens to prosecute the respondent for its failure to comply with said order of the Mediation Board and its failure to post said notices, and subject the respondent and its officers and agents to the penalties provided for in the Act, and that he will unless restrained by the court, proceed with such prosecutions. (R. 26.)

The penalties provided by the Act are a fine not less than $1,000.00, nor more than $20,000.00, or imprisonment for not more than six months, or both such fine and imprisonment, for each offense, and every day's failure to comply constitutes a separate offense. (Section 2, Tenth.)

The complaint then sets forth the particulars in which it is claimed that the Act is unconstitutional as to the respondent, which are not herein set out, because they were not considered by the trial court on account of its finding that the respondent is an interurban railroad not subject to the provisions of the act, but will be considered later in the argument. (R. 29-32.)

The complaint also sets out the facts which show that if it be subjected to the threatened prosecutions, it will suffer irreparable injury and damage, and that it has no plain, speedy and adequate remedy at law, which allegations are not herein referred to in detail, because the petitioners do not in this court complain of the finding by the trial court as to the truth of these allegations. (R. 23-24.)

The petitioner Shields, in addition to denying the allegations of the complaint, as above set out, alleges that upon request of the Mediation Board proceedings were instituted before the Interstate Commerce Commission to determine whether the respondent came within the above proviso exempting certain carriers from the Railway Labor Act; that the Commission held a hearing, at which respondent was represented and introduced evidence, and that prior to the bringing of this action the Commission handed down a decision, in which it held that the respondent's lines "do not constitute a street, interurban or suburban electric railway within the meaning

of the exemption proviso," (R. 36), and attached to the answer a copy of the report of the Commission, the report being found at R. 42-53.

The answer then alleges: "The Commission's determination that an electric railway does not come within the proviso set forth in the preceding paragraph is controlling, unless arbitrary, unreasonable or not based upon substantial evidence." (R. 36.)

Subsequently the petitioner Interstate Commerce Commission was permitted by the court to file its petition in intervention in the case, in which it set forth substantially the same matters set forth in petitioner Shields' answer. (R. 39-41.)

To the answers of petitioners, respondent filed a reply, in which the allegation of the answer and petition in intervention with respect to the hearing before the Interstate Commerce Commission and its report were admitted, and then alleged "that said report of said Interstate Commerce Commission was capricious, arbitrary and contrary to the uncontradicted evidence therein and is wholly without any evidence to support it; that the only evidence introduced at said hearing was the evidence introduced in behalf of The Utah Idaho Central Railroad Company; that no evidence was introduced by any of the other parties in conflict therewith, and that said evidence introduced by said plaintiff conclusively showed that the plaintiff is an interurban railroad, coming within the provisions of the exemption in Section 1, First, of said Railway Labor Act, and notwithstanding such evidence was uncontradicted and conclusively so shows, said Interstate Commerce Commission arbitrarily, capriciously and unreasonably made a report to the contrary, in violation of the rights of the plaintiff, namely, that the plaintiff is not an interurban railroad coming within the proviso exempting it from the operation of said Railway Labor Act, and said report is not supported by any evidence introduced at said hearing and the same is not binding on this plaintiff." (R. 55.)

The reply concluded by reiterating the allegations of unconstitutionality of the Act, as set out in the amended bill of complaint.

It was upon the foregoing issues that the trial was had and upon which the District Court made its findings and

judgment, granting the injunction as prayed for by the respondent and from which an appeal was prosecuted to the Circuit Court of Appeals for the Tenth Circuit by both petitioners herein, by which court the decision of the District Court was affirmed, 95 Fed. (2d) 911.[1]

[1] While the Trial Court rendered no written opinion, he did, both during the trial and at its conclusion, state his views regarding the case. (R. 70, 72, 147, 148.)

THE EVIDENCE

Neither of the petitioners introduced any evidence before the court as to the status of respondent as to being or not being an interurban railroad (R. 146), so that its status as such must be determined solely from the evidence introduced in behalf of the respondent.

The location of the line of railroad of the respondent is shown by the map which was introduced as Exhibit 1 (R. 157). It runs from Ogden, Utah, in Weber County through a portion of Weber, Box Elder and Cache Counties, over the state line into Preston, Franklin County, Idaho, its length being approximately 95 miles. It has two branches, one extending west and south from Lewiston, Utah, to Quinny and Thain, a distance of approximately twelve miles, and the other from Harrisville, in Weber County, Utah, to Plain City and Warren, a distance of approximately eight miles. The line extends from the middle of the block between Grant and Lincoln Avenues and Twenty-third and Twenty-fourth Streets—the block in which the Postoffice building is located in Ogden, which is the second largest city in Utah, along Lincoln Avenue, which is one of the principal streets of the city, to the next town, which is Willard, where it also occupies a public street for a distance of approximately one mile, thence to the next city, which is Brigham City, where it again runs along a public street for a distance of approximately four miles, thence to Honeyville, a small town, where it is on one of the two streets of that town. It thus serves the northern portion of the Salt Lake Valley. After leaving that town, the line extends over what is known as the Collinston divide into Cache Valley, which that divide separates from the Salt Lake Valley, and enters Mendon, traverses there a public street throughout the city limits, thence to the next town, which is Wellsville,

enters that town on a public street, makes a sharp right a turn thereon, and then proceeds along the main street of town for the entire length of that street. The next tow Hyrum, where the line occupies a public street for the e length of its line therein. Thence it proceeds to Milly where it again occupies a public street between the town's its. The same is true of the next town, Providence. Lo the fourth largest city in Utah, is the next town reached there the line occupies the main paved business street and residential extensions between the city limits. The s is true of the next city, Smithfield. Thence it proceed the next city, Richmond, where it occupies a public street its entire length, this street being two blocks from the m street. Lewiston, the next town, is the only city or town on line which is entered by a private right of way, although e there the track occupies a public street for a short dista The line then enters Idaho, only because the Cache Va extends beyond the state limits, and proceeds in Idaho a tance of about six miles to its northern terminus, the city Preston, where it occupies the main paved street to the of the line. (R. 79-80, 268.)

In all of the cities, the respondent in its operation is s ject to speed limit regulations of from twelve to fifteen m per hour; in Logan along the main paved street being twe and it is likewise subject to the general traffic stop-and signals there, and in Smithfield the same as other vehic using the streets. (R. 80-81.)

The respondent also operates a bus line from Og to Preston, paralleling the rail line upon which the freight passenger trains move, except that instead of going o the Collinston divide it proceeds on the main highway ea ward from Brigham City through the Sardine canyon, to Cache Valley. (R. 81.)

The respondent also operates a local urban bus line Logan City, which, in addition to serving the residents of city, transports students to and from the State Agricultu College, which is located there, as well as its supplies. (R. 82.)

Respondent's line substantially parallels the Oregon Sh Line Railroad to the Collinston divide, except that the Sh

Line does not occupy any city or town streets, but that railroad thence proceeds northward to Cache Junction, from which a branch line parallels respondent's line through the Cache Valley to Preston. The Oregon Short Line formerly entered Cache Valley over the Collinston divide, as does the respondent's line now, but that line was abandoned by the Short Line because it was not adaptable to steam line operation, because of its heavy grades and sharp curvatures. (R. 82.)

In all the cities and towns through which the line passes, the respondent of course had to obtain franchises, as well as from the counties in which highways are occupied. All of these franchises require it to use a motive power other than steam, and some authorize it only to operate as a "street and interurban," or 'interurban or street railway." (R. 84, Exhibit 2, R. 158, 269-271.) 18.2 per cent of respondent's line is on public highways or city or town streets, but within the limits of towns and cities, except through Lewiston, where almost one hundred per cent is on the city's streets, and with the exception of Lewiston, it is only outside of towns and cities that a private right of way is used. In other words, a private right of way is used only to reach cities and towns, so as to prevent the line being any more circuitous than practicable, but one they are reached, then the public streets are used, but no matter how circuitous, the line was so constructed as to reach every city and town in the valley. (R. 90; Exhibit 10, R. 169; Exhibit 11 Com., R. 286.) [2]

The respondent has interchanges with the Bamberger Electric line at Ogden with the Denver and Rio Grande Western Railroad at Ogden and with the Oregon Short Line Railroad at several points (R. 49), and has joint tariffs with substantially all the railroads of the country (R. 141), but sells no

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[2] The numbers of the Exhibits from 7 to 25 introduced before the commission are one less than those introduced before the Court, and in the references herein the Exhibits introduced before the Commission are indicated by the symbol "Com." Exhibit 26 before the Commission was not introduced in evidence in the trial before the Court by respondent as part of its case in chief, but only became a part of the record before the Court because it was introduced by respondent in rebuttal, together with all of the record before the Commission.

interchange passenger tickets except between it and its connecting electric line (R. 95, 296, 312). It never acts as a "bridge carrier" between other lines of railroad, but either as an originating as well as a delivery carrier, or as an originating or delivery carrier (R. 93, Exhibit 1, R. 157, R. 313). It makes no discrimination as to which of the steam lines to which freight is delivered, that being determined by the shipper. (R. 93).

The history of the development of respondent's line is typical of practically all interurbans, namely, the extension of street car systems and the connecting of small interurbans. The evidence discloses that history of the building of the line to be as follows (R. 158-161):

> "The present Utah Idaho Central Railroad Company is the result of the combination and extension of several small street car and interurban properties.
>
> It had its inception in Ogden, Utah, about 1890, from a street car system, approximately three or four miles long, upon which were operated some horse drawn cars. This company eventually became insolvent and when liquidated its assets were purchased by a group of Northern Utah citizens, headed by the late David Eccles, who organized a corporation under the laws of Utah, which was known as the Ogden Rapid Transit Company. This change took place in the late nineties and thereafter marked the beginning of the rehabilitation, electrification and further expansion of the properties which are known today as Utah Rapid Transit Company, located within the corporate limits of Ogden City, and The Utah Idaho Central Railroad Company, the interurban line in question.
>
> Sometime in the late nineties, a corporation was formed under the name of the Ogden and Northwestern Railroad Company, which built a small interurban line of railroad from the north city limits of Ogden along the country roads to Hot Springs in Box Elder County, and operated thereon for passenger and some freight business, their initial power being furnished by a small steam locomotive.
>
> The rails of this new company connected at the north city limits of Ogden with the rails of the Ogden

Rapid Transit Company on Washington Avenue, the two companies jointly handling interurban traffic.

Subsequently the same interests who owned or held control of the Ogden Rapid Transit Company acquired the ownership of the Ogden and Northwestern Railroad Company and from that time on operated common equipment over both properties.

Approximately in the year 1910, the Ogden Rapid Transit Company as a corporation acquired the property of the Ogden and Northwestern Railroad Company and equipped the latter company for an electric interurban operation and also extended the line along the public highway from Ogden Hot Springs to Brigham City, Utah, which is located twenty-one miles north of Ogden, operating electrically over the entire line for the transportation of passengers and freight.

Contemporaneously with this development between Ogden and Brigham City, practically the same people who owned the Ogden Rapid Transit Company built a line of street and interurban railway in the City of Logan, Cache County, extending same northward through Hyde Park to Smithfield, Utah, a distance of about eight miles, and south through Providence, Millville and Hyrum to Wellsville, Utah, a distance of approximately twelve miles, operating over this interurban by means of electrical power and handling passenger and freight business, the freight business being largely agricultural products produced in the vicinity of their line of railroad.

About the month of May, 1914, the Ogden Rapid Transit Company operating in Ogden City and from Ogden, Utah, to Brigham, Utah, and the Logan Rapid Transit Company, operating in Logan City and between Wellsville, Utah, and Smithfield, Utah, were consolidated into a single corporation under the laws of the State of Utah, known as the Ogden Logan and Idaho Railway Company.

This corporation for a time thereafter operated all of the properties formerly owned and controlled

by the Ogden Rapid Transit Company and the Logan Rapid Transit Company, and also commencing about the time of the consolidation rebuilt a portion of the line extending from Ogden northward through Brigham City and constructed a new line from Brigham City north over the Collinston divide into Cache Valley connecting with the southern terminus of the Logan Rapid Transit Company; also extending the northern terminus from Smithfield, Utah, to Lewiston, Utah, a distance of eleven miles, and eventually crossing the state line to Preston, Idaho, which lies approximately six miles north of the Utah state line.

The Ogden Logan and Idaho Railway Company continued thereafter to operate the street car system in the City of Ogden, the street car system in the City of Logan, and also the interurban line which had been developed out of the interurban properties of the Ogden Rapid Transit Company and the Logan Rapid Transit Company, continuing to carry on the same general character of business of transporting both passengers and freight with electric cars.

In the latter part of 1919, it seemed desirable to segregate the interurban operations of the company from the purely local street car operations in the City of Ogden and the suburban operations extending east from Ogden City into Ogden Canyon. Accordingly a new corporation was formed known as the Utah Rapid Transit Company, which took over and operated the local street car system in Ogden, Utah, and the suburban line running east from Ogden into Ogden Canyon, the ownership and operation of the interurban railroad from Ogden, Utah, to Preston, Idaho, remaining with the Ogden Logan and Idaho Railway Company, which had changed its name to Utah Idaho Central Railroad Company.

Utah Idaho Central Railroad Company, a Utah corporation, continued to operate these interurban lines until the latter part of the year 1926, when a corporate reorganization took place and the properties were then continued under the ownership and operation

of The Utah Idaho Central Railroad Company, a Delaware corporation, which is the present owner and operating company.

Throughout all of these developments of this interurban property through the various companies previously named, the personnel of its employes and owners has to a very large extent remained that of the original street car and interurban companies, namely, the Ogden Rapid Transit Company and the Logan Rapid Transit Company."

The purpose and method of operation of the line was then shown in a general way, followed by evidence in detail as to its various phases as follows. (R. 161-163.):

"As indicated in the history of the corporate development of The Utah Idaho Central Railroad Company, the property as it now exists was practically completed in the latter part of the year 1915 and represents as previously explained the joining together of individual small interurban railroads previously constructed in Cache Valley and in Weber and Box Elder Counties.

These roads were practically entirely financed by local citizens in the Northern Utah area who were collectively interested in the various agricultural and agricultural manufacturing pursuits which are common to this section, such as dairying and milk processing; sugar beet raising and sugar manufacturing; canning; livestock; poultry; fruits; vegetables, etc.

These people were naturally also interested in the economic, cultural and educational development of the various small communities which are now contiguous to the interurban railroad. Their idea in the construction of the constituent properties and in the later joining together of these properties into one line was to furnish an easy convenient method of intercourse between those communities and also to furnish a method of transporting the raw products grown in the area to the agricultural processing and manufacturing plants which they developed within the area.

This requirement could be best and most satisfactorily served by the construction of an interurban electric line with its consequent frequent and rapid passenger service and its natural ability, by reason of its type, to provide a convenient and economical method of moving raw products at frequent intervals, and over short distances to the processing plants.

This type of service was and is distinctly within the physical scope of an interurban railroad in that, as will be later shown, its entire physical construction was designed to accommodate small trains, rapidly moving, at frequent intervals, and it is a character of service not possible of being furnished by the ordinary steam railroad, in that a major requirement of steam railroad operation is long trains and a service largely influenced as to schedule by the availability of sufficient tonnage to approximate the rating of the power used. The continual development in steam transportation of larger power with its consequent longer trains and longer intervals between those trains creates a physical condition which cannot be adapted to the type of service performed by an interurban railroad.

To illustrate this point, such services as the following have been performed by The Utah Idaho Central Railroad Company. The handling of raw milk from concentration points to condenseries. This service must be performed with a minimum of time enroute and a definite arriving time at the condensery to fit in with their daily evaporation program. This movement is generally accomplished with the power unit and one car and usually entails special service.

This company has also performed a service of moving shelled peas, from vineries to canning factories. In the canning of peas, it is necessary in order to preserve their natural flavor that a minimum amount of time be consumed from the field to the cannery, peas being harvested in the fields, taken to the vinery for shelling, and moving in lug boxes rapidly into the cannery before either time or temperature can start the change in flavor. This movement likewise is accom-

plished with one or two car trains and special service.

Another typical interurban movement is the handling of ripe tomatoes in stock cars for movement into the canning factory, usually with special service.

Large quantities of beets are handled from various loading stations in small trains to the sugar factories for processing.

These are only typical of the type of service performed and generally represent the transportation link of the industrial development contemplated as a unit by the same people who constructed the processing plants at the same time they constructed this interurban railroad.

The number of trains operated daily on this property, which will be later herein shown, in itself presents a more concrete picture of the frequency of service actually used in the operation of the property.

Likewise, there will be shown, the large number of sidings and spurs available for the loading of raw products and also there will be shown the frequency of available passenger stops for the convenience of short distance interurban travel.

The company at the present time in addition to the operation of numerous small freight trains operates both one and two car interurban passenger trains and gasoline motor busses.

A distinctive feature in the interurban passenger operation, which tends to illustrate the type of service furnished the communities involved, is the transportation of school children. The providing of educational facilities in this section is through the location of high schools at central points rather than in each community and, in the carrying out of this policy, at public expense students are brought from their homes to these centrally located schools.

For many years pick-up and delivery service has been rendered at all available points in connection with package freight. A daily package merchandise train

is operated making a round trip from Preston, Idaho, and return during the night hours.

This train is powered by an interurban electric car constructed so as to make a large portion of the car available for the handling of package freight, each car also being equipped with refrigeration facilities for the handling of perishable commodities in summer weather and with heating facilities for their handling during the winter weather. The locomotive unit of this train is likewise sufficiently powered to permit the hauling of other cars of package freight."

It is significant that there was in existence at the time of the construction of this line a steam railroad, which the respondent's line closely paralleled (R. 28.) The conclusion is irresistible that the service rendered by the ordinary steam railroad did not meet the transportation needs of the territory served, and the reason it did not meet those needs was two-fold. It was not designed to and did not provide rapidly moving trains, stopping at frequent intervals for the transportation of the public, especially the school children, as above stated, and as will later be more fully shown. It did not furnish the facilities for the gathering of the products of the soil of this purely agricultural territory and the transportation to the steam railroads of those products which could reach the outside markets without processing, and what is far more important, because it involves the greater part of the agricultural products of the territory, their gathering and transportation to the processing plants which, as pointed out, were thereupon located on respondent's line, and after being processed are transported by respondent to steam lines to be carried to the outside markets. If the then-existing steam railroad had met these needs, then respondent's line would never have been built. It was to meet them it was built, and continuously since then has been operated to meet those needs.

Evidence was introduced to show the various phases of the physical construction of the respondent's line and to demonstrate that they are so co-ordinated one with another as to prevent it rendering the type of transportation service which is rendered by the ordinary steam railroad, without a complete transformation and relocation of the line in all its details, but on the contrary to compel the rendering of a type of transpor-

ion service distinct and separate from any other agency of nsportation, whether that of an ordinary steam railroad, a ck line, a bus line, or an airplane line, and the limitations its physical construction impel what has been commonly derstood to be the transportation service of an interurban lroad.

This evidence as to the physical characteristics of the lroad was introduced in the form of Exhibits, which are set t in full in the record, and will be only briefly referred to rein for the purpose of showing that the foregoing conclu-ons are completely sustained by the record.

First, the motive power. The evidence as to that shows at the electric locomotives owned by respondent have a min-mum practical rating, in other words, the tonnage the locomo-ve will pull, of 275 tons, and a maximum of 650 tons on two all sections of the line, with an average of 550 tons, so at the number of loaded freight cars (each of which has a oss weight of 45 tons) which a locomotive will pull between gden and Brigham City is twelve cars, and less on other rts of the line (R. 85; Exhibit 5, R. 164).

Second, the equipment. The evidence with respect to that ows that the respondent owns 173 freight cars, 75 of which e of such construction that they cannot be interchanged th the steam railroads. The remaining 98 are dump cars, own as gondolas, which were purchased by the respondent r the transportation of sugar beets from the dumps estab-hed on respondent's line in the various localities in which ey are raised to the sugar factories. They are so used ring the beet season, and during the remainder of the year ey are used for the hauling of coal from the mines to the dustries located on respondent's lines, and are only inter-anged when lime which originates on respondent's line is ipped to sugar factories off respondent's line, that being e only commodity, other than sugar beets, originating on e line for which such cars are suitable. (R 85-86; R. 141-142, xhibit 6, R. 165.)

Third, the substation equipment. The evidence with re-pect to that shows that the electric power, with which the spondent's line is operated, is purchased by respondent from ne Utah Power & Light Company and delivered by that

company to the substations of the company at high voltage, transformed through the company's generating sets to 1500 volts. These substations are located at Ogden, Hot Springs, Dewey and Smithfield and the equipment of substations is of such a size that it will furnish sufficient power only for the locomotives owned by the company, that is, those capable of hauling twelve cars, and if heavier trains were to be hauled, then they would have to be rebuilt to accommodate locomotives with greater practical rating. (R. 86; Exhibit 7, R. 166).

Fourth, the electrical positive feeder and trolley circuit and negative rail circuit. The evidence as to them shows that they are so limited as to the quantity they can carry, taking into consideration line losses, that they are only sufficient to operate the locomotives with the practical rating capacity of the locomotives owned, so that if locomotives of a greater capacity were to be used, the circuits would have to be replaced (R. 86-88; Exhibit 8, R. 166-167), else the locomotives would be stalled for lack of power.[3]

Fifth, character of track construction. The evidence as to that shows that the track is constructed of light rails, the heaviest, except for a distance of two miles in the paved street in Smithfield, being 70 pounds, as contradistinguished from an average of 100 pounds on steam lines. The ties on which the rails rest are 6-8 inches, as contradistinguished from steam line rail construction, in which the ties used are not less than 7 by 9 inches, and generally 10 inches. The respondent uses a tie six feet in length, whereas the steam roads use a seven foot length, the different tie and rail construction being required by the heavier loads imposed upon them. Only eleven miles are tie plated, a tie plate being a square piece of metal between the rail and the tie, in order to form a wider base for the rail to rest on, and thus relieve the stress, whereas all the main steam lines and practically all their branches are tie plated (R. 88-89; Exhibit 9, R. 168; Exhibit 8 Com., R. 284).

Sixth, car capacity of spur and passing tracks. The evidence as to them shows that the average length of the respondent's passing tracks will accommodate 16 cars, whereas the

[3] This exhibit was not introduced before the Commission, but is purely cumulative, being another physical characteristic, which, along with all the others, would have to be changed to permit any such train operation as is typical on steam lines.

erage length of the passing tracks on the steam roads is om 75 to 150. It also shows that there are 34 spurs or ssing tracks on respondent's main line, and eleven on the anch lines, averaging approximately three miles apart on e main line and two miles apart on branch lines. (R. 90; xhibit 10, R. 169; Exhibit 9 Com., R. 285-286.)

Seventh, the curvature of the turnouts to the yard facili-s and the industries on the line. The evidence as to them ows that the curvatures on the turnouts are so restricted at neither ordinary steam locomotives nor steam passenger rs can be operated over them; and over some of them the rger freight cars can only be taken when they are taken one a time. (R. 90; Exhibit 12, which shows in detail the curva-res on the main line and sidings, and the turnouts, sidings d spurs. R. 171-195; Exhibit 11 Com., R. 281-288). Re-ondent's equipment is so designed that it can be operated such a track. For instance its locomotives are only 35 et long with a 16 foot distance from truck center to truck nter (R. 90).

Eighth, the grades. The evidence as to them shows that ere are on the main line of the respondent's line 75 or 80 ade breaks, that is points at which the percentage of grade, the up hill or down hill changes; in other words, that the e follows the contour of the country ordinarily, with no at-mpt to change the grades by cuts and fills, with the result at there are on the line what would be considered excessive ades for a steam line. The maximum is 4.77. It is indeed gnificant in this respect that as already pointed out, the e is built over the Collinston divide, formerly used by the egon Short Line, and which was abandoned by that railroad d its road reconstructed to avoid the grades and curvature er that hill. (R. 93; Exhibit 13, R. 196-199; Exhibit 12 Com., 292-293.)

By means of a profile map of respondent's road as it is nstructed in ten mile areas, with the factory rating and prac-al rating of the locomotives imposed thereon, there is shown e combined effect of the road's physical construction and cilities upon the operation of its trains. As an example, the st sheet of Exhibit 14 shows the first ten miles from Ogden, th 13 grade breaks in that section. Over it the respondent

can haul a train of twelve loaded cars northbound and fourteen cars southbound. The second sheet shows that over the next ten mile sector only twelve loaded cars can be hauled. However, trains have to be spaced so that two trains are not pulling on the power in a particular sector at the same time. So on with the other sectors, except those shown on sheets 5 and 6 over the Collinston divide. Going north or south over the divide, a train of only eight loaded cars can be operated, but the distance for which that limitation exists is a little greater going north, which is approximately eight miles, than south, which is six miles.

This situation limits the entire operation, so that if a train leaves Ogden with twelve cars and four of them are not out of the train when it reaches Dewey by reason of being destined to intervening points, it is necessary to divide the train to enable it to go over the divide. The same is true of southbound trains. (R. 94; Exhibit 14, R. 200-208; Exhibit 13 Com., R. 293-294.)

Thus it is shown by the evidence that not many, as admitted by counsel for petitioners, but all of the physical characteristics of respondent's railroad are those of an interurban railroad. Moreover, that they are all correlated and tied together, so as to make necessary a particular type of transportation, which is interurban in character, that is, short, light trains operated at high speed, at frequent intervals, and making frequent stops along the line, both in the carriage of passengers and freight. In other words, that such a type of operation is not made necessary by only one of those physical characteristics, but by all of them operating uniformly as limiting factors, so that a change in one of them would not make possible a change in operation, but all would have to be changed, and substantially to the same extent; that the limitations of motive power, electric power at the substations and through the wires, the character of equipment, the length of sidings, the construction of the track as to rails, ties, etc., its grades, the curvatures thereof and of the turnouts, and the operation upon the public highways and city streets all impose upon the respondent the same limitation of operation as above outlined If the respondent desired to increase its tonnage, it would have to operate additional trains, not longer trains (R. 88). On the contrary, the type of operation of the

ordinary steam railroad is entirely different. Upon them the track construction is of heavy rails, of large ties, tie plated, capable of standing heavy loads, with motive power capable of hauling heavy tonnage, with grades and curvatures held to a minimum, permitting the operation of long and heavy trains moving at intervals fixed by the necessity of obtaining sufficient tonnage to warrant the use of the motive power, and making infrequent stops (R. 88).

The evidence, in a series of statistical exhibits, shows that, as compelled by its physical characteristics, the actual operation of the railroad is in fact of the interurban type.

Exhibit 15 shows from the years 1932 to 1935, inclusive, by months, the number of passenger trains, passenger busses and freight trains operated over the line and the average daily number. In brief, it shows that during the year 1932 there was an average of 9.7 passenger trains per day, 4.1 passenger busses and 6.6 freight trains. In the year 1933, the average number of passenger trains was 11, passenger busses 5.6, freight trains 7.7. In 1934, the average was 11.5 passenger trains, 4.1 busses and 7.7 freight trains. In the year 1935, the average was 9.6 passenger trains, 4.2 busses and 7.8 freight trains. (R. 96-97; Exhibit 15, R. 209-210; Exhibit 14 Com., R. 294-295.)

The petitioners in their brief seek to minimize the difference between the length of trains on respondent's line by calculating the number of cars moved per day by respondent from the number of cars moved per train and the number of trains moved per day. Taking the figures for 1934, they say correctly that respondent operated an average of 11.5 passenger trains per day of 1.1 cars each, and an average of 7.7 freight trains per day of 6.2 cars each, which would mean 12.7 passenger cars per day and 47.7 freight cars per day. This calculation, however, but serves to emphasize more clearly the difference between operations on respondent's line and upon a steam railroad operating in the same territory. On the Union Pacific Railroad, the average length of a passenger train in the year 1934 was 10.8 cars and the average length of a freight train was 63 cars. (Exhibit 20, R. 216.) In other words, the amount of one day's passenger business on respondent's line is almost all handled by one

train on the Union Pacific and all the freight business done by the respondent is handled on less than the average freight train on the Union Pacific. Now, if the operation upon respondent's line is compared with the operation upon the electrified portion of a steam railroad, such as the Chicago, Milwaukee, St. Paul and Pacific Railroad, the results are substantially the same. There were no statistics introduced for the year 1934, but in the year 1933 the average length of a passenger train upon the electrified portion of that road was 10.9 cars and the average length of a freight train was 54.2 cars; in other words, the operation upon respondent's line is entirely distinct from the operation upon a steam line, even though electrical motive power is used by the latter on a portion of its line, and this difference is the necessary result of the different characteristics of the lines, other than the mere matter of motive power used.

Passenger trains are operated on a regular daily schedule, (R. 138; Exhibit 42, R. 243-245).[4] Freight trains are operated as special or "extra" trains on orders as needed to accommodate the traffic (R. 96).

The respondent operates a daily merchandise train for the handling of less than carload freight, which is powered by a passenger car with the windows boarded up and the passenger carrying space used for the handling of package freight. Perishables in the summer time are handled on this train in a specially constructed refrigerator box, and in the winter the car is heated to protect shipments affected by extreme cold. A pick-up and delivery service is rendered as to all shipments in less than carload lots. The daily merchandise train is operated so that the shipper in Ogden, or in Salt Lake City (the train being operated in connection with the Bamberger Electric Railroad, an interurban operating between Salt Lake and Ogden) can every working day in the year have the railroad's truck call at his place of business at any time before closing time for any merchandise he desires to ship on respondent's line and the same will be delivered to the consignee at any point on the line at the opening of business the following morning. A similar reverse service is given by these railroads southward. The freight that is thus moved consists

[4] This Exhibit was not introduced before the Commission.

all types of merchandise shipped by wholesalers in Salt
ke and Ogden to consignees on respondent's line, Southward
m the farms and processing plants, the agricultural prod-
ts are shipped to the markets in Salt Lake and Ogden.
96-97; Exhibit 15, R. 278, 279.)

Exhibit 16 is a list of the passenger stations on respond-
t's line, showing the distances between stations, whether
ey are agency stations or not, the populations of the cities
towns where stops are made, except that where no popula-
n is shown it is a country road stop. In brief, in the 107
les of main line and the Plain City branch, there are 73
ssenger stops, or approximately a stop every mile and a
lf, practically at every cross road. In every city or town
ere is an agency station and outside them the passenger
lks down the country road to the stopping place and flags
e train. In many of them the respondent has built a shelter
a protection against wind and rain. In the cities and
wns (other than the station at Ogden), the train stops in
e middle of the street, and the passenger walks out and
ards the train as he would a street car. In fact, the pas-
nger service rendered by the respondent, as is the case gen-
ally with interurbans, is but an extension of a street car
stem to the country. The stops are made at the cross roads,
cause they are the concentration points of the areas of
pulation. (R. 97-99; Exhibit 16, R. 211-213; Exhibit 15
om., R. 295, 296.)

Exhibit 17 shows for the five year period 1931 to 1935,
clusive, the number of passengers handled, the amount of
assenger revenue, and the average fare per passenger. In
e year 1931, the line handled 489,000 passengers, at an
verage fare of 18.3 cents. In 1932, 407,000 passengers, at
n average fare of 16.5 cents. In 1933, 366,000 passengers,
an average fare of 16.8 cents; in 1934, 408,000 passengers,
an average fare of 15 cents and in 1935, 400,000 passengers,
an average fare of 16.1 cents. This demonstrates that
e service rendered is but an extended street car service;
other words, the closely spaced passenger stops are being
sed to travel from one community to another, or to and
om the larger communities to work, which is a character-
tic interurban service. (R. 99; Exhibit 17, R. 213-214;
xhibit 16 Com., R. 296).

Exhibit 18 classifies the passengers handled during the same five year period between regular passengers and school children. The school children in Cache Valley are transported at public expense to centrally located schools. For example, there are only two county high schools in the county, both of which have been located on respondent's line, and the students are picked up at the various stops on respondent's line and transported to and from these schools on special trains operated for that purpose at extremely low fares. The Exhibit shows that in 1935, out of a total of 400,000 passengers carried, 185,000, or a little less than half, were school children carried on special school trains and there was substantially the same percentage in other years. (R. 99-100; Exhibit 18, R. 214; Exhibit 17 Com., R. 296-297.)

The foregoing exhibits prove that the actual operation of respondent's line is, as not only would be expected, but made necessary by its physical makeup, not the operation of an ordinary steam railroad, but also prove that notwithstanding the limitations imposed by its type of construction, which would prevent it rendering the type of service rendered by an ordinary steam railroad, nevertheless they suffice to permit respondent to render the public that type of interurban service which meets the needs of the public it serves.

By a comparison made with all the steam railroads operating into Utah, the evidence further emphasizes the difference between their physical construction and operation and that of respondent. Thus Exhibit 19 shows the list of sidings for a distance of 200 miles from Ogden on the Los Angeles and Salt Lake Railroad, the Southern Pacific Railroad, the Oregon Short Line Railroad, the Union Pacific Railroad, and the Denver and Rio Grande Western Railroad. It will be recalled that an exhibit of this character introduced for the respondent showed the average length of sidings for the accomodation of trains to be 16 cars. Exhibit No. 19 shows for the Los Angeles Railroad that the average length of all its sidings in this 200 mile stretch is 87 cars, or between five and six times the length of respondent's; for the Southern Pacific, the average length is 114 cars, or between seven and eight times the length of respondent's; for the Oregon Short Line, the average length is 86 cars, or between five and six times the length of respondent's; for the Union Pacific, the

ge length is 109 cars, or about seven times the length spondent's; for the Denver and Rio Grande, the average is 36 cars, or between five and six times the length of ndent's. (R. 101; Exhibit 19, R. 215; Exhibit 18, Com., 7.)

The increased length of sidings on steam road tracks accommodate long steam road trains. For the same n, the restricted length of respondent's is to accomte short interurban trains. The number of sidings on the two hundred miles of the Los Angeles Railroad is 35. same is true of other steam roads. On the 95 miles spondent's line, there are practically that number, in the mileage. In fact, there are loading facilities every or four miles on respondent's line, available to the er to load his products for the market or processing s. The farmer does not have to wait for the train to along, as in the case of the ordinary commercial steam oad, and have the train load it. The respondent spots opriate cars at each of these sidings to be used by the er in loading his products. The principal movement is rload lots, and those which are not are concentrated at ey stations which are located on the respondent's line six or seven miles apart. (R. 98.) In Logan there is oling room built into the freight house, and in Brigham a refrigerator compartment. These permit the farmer ing in perishable commodities in advance of train time, them, and leave them at the station to be loaded onto rain. (R. 98.)

The comparison of passenger stops would be much more of line. Passenger stops on respondent's line average t every mile and a half; on the average steam railroad, will not average one in twenty miles. In this western try, there are distances as high as forty or fifty miles een steam railroad passenger stops. (R. 101; Exhibit R. 215; Exhibit 18 Com., R. 297.)

Exhibit 20 makes a comparison between the operating its upon the steam lines coming into Utah and the results respondent's line, with the consequent operating costs mile, that is, the cost of labor for each car moved. It shows in 1935 the average length of passenger trains on the

Union Pacific was 10.7 cars, with an average cost for tra
men's service of 2.86 cents per car mile; on the Oregon Sh
Line, the average length of such trains was 8.6 cars a
average cost 3.75 cents per car mile; on the Los Ange
and Salt Lake, the average length of such trains was 1
cars and average cost 3.22 cents per car mile; on the Southe
Pacific, the average length of such trains was 10.3 cars a
the average cost 3.32 cents per car mile; on the Denv
and Rio Grande, the average length of such trains was
cars and the average cost 3.89 cents per car mile. On t
respondent's line, the average length of passenger trai
was 1.1 cars and the average cost 4.9 cents per car mi
in other words, taking the Union Pacific as an example, t
trains on respondent's line are one-tenth as long and t
trainmen's cost per mile almost double. The comparis
in other years shows similar results. (R. 101-103; Exhib
20, R. 216-222; Exhibit 19 Com., R. 297-302.)

It shows that for the year 1935, the average length
a freight train on the Union Pacific was 60 cars; the avera
cost for trainmen's service was .65 of a cent per car mi
On the Oregon Short Line, the average length of such trai
was 48 cars, its cost 1.01 cents per car mile. For the L
Angeles and Salt Lake, the average length of such trai
was 48.3 cars, average cost 1.21 cents per car mile. For th
Southern Pacific, the average length of such trains was 56
cars, average cost 1.08 cents per car mile. For the Denv
and Rio Grande, the average length of such trains was 42
cars, average cost 1.28 cents per car mile. For the respon
ent, the average freight train length was only 6.5 car
average cost 2.5 cents per car mile. As compared with th
Union Pacific, respondent's train length is approximatel
one-tenth, and respondent's labor cost for transporting eac
car one mile was about four times greater. (R. 102; Exhib
20, R. 216-222; Exhibit 19 Com., R. 297-302.)

An even more pertinent comparison is made in Exhib
21 between the operating results on respondent's line an
on a steam railroad which operates a portion of its line b
power other than steam. This is undoubtedly the type
railroad the Congress had in mind when in Section 1, Firs
of the Railway Labor Act it provided that "any part of th
general steam railroad system of transportation now or her

after operated by any other motive power," should not be excluded from the Act. Such a railroad is the Chicago, Milwaukee and St. Paul Railroad, a western railroad, a considerable portion of which has been electrified, namely, four or five hundred miles through Montana and east and west thereof. That road where electrified uses very large electric locomotives, with self generating features, about ten times as large as those used on respondent's line, with very heavy transmission lines, and so in Exhibit 21 the comparison is made between respondent's line and that railroad. It shows that the average length of passenger trains on that portion of the railroad operated by steam was six cars, with an operating cost per car mile of 4.82 cents, whereas on the portion electrified it was 10.1 cars and the cost per car mile 3.08 cents. The average length of freight trains on the steam portion was 45.8 cars and the cost per car mile was 1.16 cents, whereas on the electrified portion the average length of trains was 72.6 cars and the cost per car mile 3.08 cents. This clearly shows that where there can be an electrical operation under the same conditions as a steam operation, the railroad is capable of hauling as heavy or heavier trains, and it is even more efficient and less costly.

The situation, however, is entirely different, where, as on respondent's line, or the ordinary interurban railroad, the size of trains is limited by its physical characteristics, with consequently greatly increased cost of operation. (R. 104; Exhibit 21, R. 222-223; Exhibit 20 Com., R. 303-304.)

The facts brought out in Exhibits 20 and 21, and the differences between the operations of freight and passenger trains on steam lines and lines in part electrified, and the operation of trains on respondent's line, are more pointedly shown by the graphs, which constitute Exhibits 22, 23, 24 and 25. (R. 224-227; Exhibits 21, 22, 23 and 24 Com., R. 303-306.)

Some criticism has been made of these comparisons in the hearing before the Commission, because it was there claimed that the comparison should be made between respondent's line and steam lines of similar length, or with the branch lines of the larger railroads. However, no such evidence was introduced at the trial, or at the hearing before the Commission, and inasmuch as petitioners knew of this omission, and

made no effort to introduce such evidence, it cannot no
assumed that such comparison would show any substa
difference, because the record shows that there are the
differences between interurban branches and branche
steam lines as there are between interurban main lines
the main steam lines. (R. 305.)

The Exhibits and the testimony respecting them b
out forcibly the difference in labor conditions on resp
ent's line and on the steam railroads. Because of the
trains operated on steam railroads, a larger crew is requi
and a different type of ability and experience, also
dangers are greater, and because steam trains are oper
long distances the crews are required to be separated f
their homes for long periods. On steam railroads, the c
consists of five men on passenger trains and six on fre
trains, whereas on respondent's line on passenger trai
maximum of only two is required, and on freight trai
maximum of four is required, and on trains operated b
power unit and one car, only two men are required. (R. 1
The pay by reason of the foregoing differences is less
respondent's line than on steam lines. (R. 106.)

The difference is also illustrated by the fact that si
1909 the employes of respondent have been unionized,
they did not belong to any of the steam railroad unio
commonly called the Big Brotherhoods, but were memb
of the Amalgamated Association of Street and Electric R
ployes of America, an affiliate of the American Federat
of Labor, and continuously since 1909 up to June 1, 19
by written agreements from time to time renewed betw
the respondent and that union, the rates of pay and con
tions of labor have been fixed. Never during that ent
period has there been a strike or a threat of a strike, a
the amicable relations between the respondent and its e
ployes were not disturbed until after the passage of t
Railway Labor Act, when an attempt was made by t
Brotherhood of Railway Trainmen (one of the Big Broth
hoods), to organize the employes into that union, for t
purpose of imposing upon the respondent the rates of p
and conditions of employment prevailing on steam railroa
and to that end forcing the respondent to comply with t

Railway Labor Act. (R. 106-109, 110; Exhibits 27, 27-1, 27-2 and 27-3, R. 230-321.) [5]

It is shown that not only is there a difference in rates of pay on respondent's line, but in method of pay. On steam railroads, the employes are paid on a basis of an eight-hour day, whereas on respondent's line they are paid on an hourly basis. The effect of this difference is shown by an illustration (R. 132):

A trainman is called in Preston, Idaho, respondent's northern terminus, to bring a passenger train to Ogden, Utah. That would consume three hours' actual running time. If the steam railroad method were used, respondent would be required to pay him for an eight hour day. After he arrives in Ogden, and it is assumed respondent finds it necessary to send him to Plain City, a point about ten or twelve miles from Ogden, for a car of potatoes, which would consume 45 minutes, the respondent would be required to pay him the eight-hour day minimum first for the run from Preston to Ogden, and would be required to pay him time and a half for not less than four hours, in addition to the pay for a day for three hours' work. (R. 132-138.)

Obviously the Congress recognized these differences when it exempted the interurban railroads from the operation of the Railway Labor Act, to prevent the undue hardship they would suffer if the standards of pay and conditions of employment applicable to steam railroads were applied to them.

The respondent then introduced in evidence the order of the Director General of Railroads, that it was never subject to Federal control (R. 109, 110; Exhibit 26, R. 228; Exhibit 25 Com., R. 306). Obviously, as was stated before the Commission, "because it was essentially an interurban railroad, and was not a part of the general steam railroad system of transportation, the preservation of which the government felt to be necessary in order to advance its military activities." It was also shown that the Interstate Commerce Commission classified the respondent as an interurban railroad in its

[5] Exhibit 27 is so numbered both before the Commission and before the Court.

decision in the *Electric Railway Mail Pay Cases*, 58 *I. C. C.* 455, 98 *I. C. C.* 737. It was also shown that the Interstate Commerce Commission recognized that the respondent did not come within the provisions of Section 20 (a) of the Transportation Act. The respondent, upon reorganization after it came out of receivership in 1926, issued 20,000 shares of non-par value common stock and $2,000,000.00 in first mortgage bonds. These issues were reported to the Interstate Commerce Commission in its annual report for the year ending December 31, 1926, (R. 111-112). Subsequently the Interstate Commerce Commission requested further information respecting the issuance of these securities (R. 113-114). The additional information requested was forwarded, in which the issuance of the securities was fully explained (R. 115-116), and yet the Commission never made any objection to their issuance (R. 117). The respondent, it was shown, also accounts to the Interstate Commerce Commission in the manner prescribed for electric railways, rather than in the way prescribed for steam railroads, (R. 117-119). It was also shown that the Railroad Labor Board (constituted under the Transportation Act of 1920, in Title III), which Act contained a provision excepting interurban railways not operating as a part of a general steam-railroad system of transportation, held that railroads of the type of respondent were excepted from the Act, and at no time was the respondent required to comply with the provisions of that Act. (Decision No. 33, Docket 26 A.)

The only other evidence introduced at the trial before the Commission as to respondent's characteristics and its operation were statements as to its revenue. The gross revenue in 1935 was $514,000.00. The average annual gross revenue over a period of twenty years,[6] which is the period during which it has been in actual operation, is $697,000.00 per year, so that the decrease in the year 1935 over the average was $183,000.00. The average annual operating revenue during the period from passenger operations was $217,000.00. The passenger revenue in 1935 was $64,000.00. The average annual freight revenue was $404,000.00. The 1935 freight revenue was $403,000.00, or within one thousand dollars of the average during the period of the road's exist-

[6] In using these statistics petitioners in their brief use only the last ten years. (p. 7.)

ence. During that entire period, there has been no substantial change in the type of freight operation or the revenues produced by it, whereas the passenger revenue in 1935 was $153,000.00 less than the twenty years' average, that reduction accounting for practically all the reduction in the gross revenue. While there has been no change in the character of the railroad, there has been a change or loss in passenger revenue, due to the increased number of automobiles in use and the building of hard surfaced highways parallelling substantially the respondent's line of railroad. There has been no change in respondent's freight operation from the beginning; the only change has been in the number of passenger trains operated. Originally trains were operated out of Ogden every two hours. They have been reduced to eight trains and busses per day. (R. 138-139.) [7]

An analysis of the carloads of freight business during the last six months of 1935, which is representative of the entire period of operations, as set out in Exhibit 28 [8] before the Court and the Commission. (R. 233), shows that the carloads of freight received by the respondent during that period was 4673 cars of which 3843 cars, or 82.2 per cent, originated within the State of Utah and terminated on some point along respondent's line; 2336 of this number, 49.98 per cent, or about one-half, originated upon respondent's line and the balance on the lines of various steam and electric connections. In other words, only 830 cars, or only 17.8 per cent, came from without the state. Of the total of 4673 cars received, 1476 cars were of raw materials to processing plants on respondent's line, 1716 cars were of products used in the processing of agricultural products at plants on respondent's line, and 228 cars were of other types of agricultural products or supplies. The total of these, or 3420 cars out of 4673 cars, were directly tied into agricultural production or processing purely local in character, 812 cars were construction materials

[7] While as already stated, Exhibit 26 before the Commission was not introduced in evidence before the Court the foregoing testimony covers all that was contained in that Exhibit (R. 229, 307-310).

[8] There are two Exhibits No. 28 before the Commission. The first one (R. 232) is not referred to herein. It shows the deficits in net revenue over the four year period, 1930-1935. It is not herein referred to because it has no bearing upon the status of respondent, but was introduced before the Court for the purpose of showing irreparable damage.

and 441 cars of general commodities (R. 139-140), of less th
10 per cent of the cars received were not tied in to t
respondent's peculiarly local service.

During this same period, 4020 cars originated upon r
spondent's line. Of these, 2400, or 59.7 per cent, were d
tined to points within the State of Utah and 1620 cars,
40.3 per cent, were destined to points without the sta
Out of these 4020 cars, 927 cars were raw agricultural pro
ucts going to market, 1408 cars were raw agricultural produ
going to processing plants, sugar beets to the sugar factori
milk to the condensers, etc., 910 cars were processed ag
cultural products going to market, sugar, milk, etc., 3
cars were local products produced on respondent's line a
being destined to the processing plants, such as lime quarri
at points on respondent's line and going to the sugar factori
for use therein, and only 386 cars represent other types
shipment or less than 10 per cent of the cars forwarde
were not tied in to the respondent's peculiarly local service.
This evidence, taken into consideration with the othe
evidence introduced, shows that the freight service rendere
the territory is primarily as much of a local character a
the passenger service furnished the people of the territor
served. This can best be emphasized by concrete example
(R. 140-141.)

The farmer brings his perishables to the stations, wher
cooling facilities are furnished, and leaves them there an
they are then loaded by respondent's employes. (R. 98.)

The farmers of a locality gather together their agricul-
tural products which are to be shipped out and bring them t
the cross-roads, where cars are spotted by respondent fo
loading, the sidings of the respondent being located on th
average of approximately every three miles apart (R. 98);
there they are loaded into the cars and respondent at once,
by means of a short train and light locomotive, delivers
them to transcontinental carriers, to be by them carried to
the markets (R. 88).

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[9] The figures given for the last six months' period in 1934 are shown in Exhibit 28. The figures for that period were not introduced at the trial but it is conceded by petitioners in their brief that there was no material difference between the two periods. (Note 21 of brief of petitioners.)

The farmers haul their peas to the vineries, where they are shelled. There they are picked up at frequent intervals, so as to prevent losing their flavor, by small trains of one or two cars each powered by a motored passenger car, and delivered to the canneries (R. 162).

The farmers bring their milk to the cross-roads, where it is picked up by respondent in one-car trains operated at high speed (R. 92), this type of operation being necessary because of the perishable character of the commodity. These trains haul no other commodities (R. 92).

The farmers haul their sugar beets to the beet dumps, where they are loaded into respondent's cars and carried to the sugar factories. The same is true of the lime rock quarried on respondent's line. The type of service rendered is the same whether the condenser or sugar factory is located within or without the state. When processed, these products are then delivered as ordered to the steam lines for shipment to the markets (R. 92, 162).

So much for the freight shipped out; that received consists principally of raw materials and supplies for use by the processing plants located on respondent's line and products to be processed and building materials for those plants. That constitutes the bulk of the shipments in, and together with the shipment of agricultural supplies constitutes all except ten per cent of the shipments moving into the territory. The net result is that of the entire carload business moving in and out during the six months' period, slightly more than 28 per cent moves outside of the State of Utah, and the greater portion of this results from the purely local service furnished by the respondent. This is shown by the fact that of the 8693 cars either originating on respondent's line or destined to a point on respondent's line, only 867, or about ten per cent, can be said to be of shipments not tied into respondent's peculiarly local service, as above set out. The testimony shows that the handling of all these products, except about ten per cent, is in the gathering process of local products of the soil and hauling them either direct to the steam roads in their original form, or after being processed, and that the function performed thereby is no different than such a gathering and hauling by trucks, in other words, a purely local function, which results in the

feeding to the steam roads such traffic as any other local means of transportation would do.

The petitioners, in their brief commencing at page 41 and extending to page 42, claim the figures that respondent has given with reference to the carload business, both forwarded and received, have been distorted, but we submit that they are not subject to that criticism for the reason that the evidence shows without dispute that 8693 cars either originated on respondent's line or were destined to a point thereon. It is true, as petitioners say, that of this number, 2336 come within the classification of both received and forwarded business, because their point of origin, as well as their point of destination, was upon respondent's line. While in our brief in opposition to the granting of the petition for certiorari we loosely spoke of that number of cars being moved, it is obvious from the context that what we meant, and what we now mean, is that 8693 cars was the total number of cars either forwarded or received as shown by the evidence [10] at the trial, and what we said then and what we say now is that less than ten per cent of the number of cars received and forwarded, by which is meant either originating at a point on respondent's line or destined to a point on respondent's line, were not tied in to the peculiarly local service of respondent.

The petitioners also criticize our use of that phrase, and by its use, of course, we did not mean local traffic, that is, traffic confined to respondent's line, but what we meant, and what we mean now, is, as clearly shown by the examples hereinbefore given, that the purpose of the construction of respondent's line was not only to give to the people of the territory it serves a passenger service, but a freight service which was not being rendered by the steam railroad then serving the territory, by encouraging the location upon its line of processing plants for processing of agricultural products of the territory served, the raising of which is the sole industry of that territory, carrying those products to the processing plants from the farm and transporting the processed products to the markets. Now, of course, those processing plants need construction materials for their construction and maintenance, and ancillary to the principal service which respondent renders as above

[10] The evidence (Exhibit 28) is in precisely the form requested by the Representative of the Brotherhood of Railway Trainmen at the hearing before the Commission (R. 310-311).

outlined, it brings those materials to the processing plants. Those processing plants require materials and products in their operation, and these are likewise brought in. The farmer raises raw products which can be marketed without processing, and these are shipped without processing over respondent's line. To carry on his farming the farmer requires machinery and other equipment and supplies, and these are shipped in and delivered by respondent practically at his farm. This is not only the service which has continuously been given by respondent to the territory served, but the agricultural and industrial development of the territory is grounded upon that service, just as the educational and social developments of the people of the territory served is grounded upon the passenger service rendered by the respondent, and it is in that sense that the passenger and freight service rendered by respondent is peculiarly local in character.

Petitioners in their brief, at page 42, do not follow either the exhibit or the evidence in distinguishing between freight in carload lots as received or forwarded, but restrict their analysis to that which actually moved during the period, with the result that of the 8693 cars referred to by respondent as originating from or destined to points on respondent's line only 6357 cars actually moved over respondent's line, because 2336 cars of the total number of cars originating from or destined to points on respondent's line both originated upon its line and were destined to points thereon. Based upon the number of cars actually moved during the period as compared with the number of cars interchanged with other lines, as shown by the evidence, namely 4021, petitioners arrive at the conclusion that 63 per cent of the cars actually moved during the period were "interchanged with trunk line railroads." This conclusion is not correct, for there is no evidence in the record to show the number of cars which were delivered to or received from its electric line connections, and what number were received from or delivered to trunk line railroads. The evidence does show, however, both before the Commission and before the Court, how many of these cars originated on respondent's line and were destined to points in Utah, and how many originated in Utah and were destined to points on respondent's line. It also shows how many originated on respondent's line and were destined

to points outside the state of Utah, exclusive of points on respondent's line in Idaho, and how many originated outside the state of Utah, exclusive of points on respondent's line in Idaho, and were destined to points on respondent's line. 2450 cars were either received from or destined to points outside the state of Utah foreign to respondent's line, or 38 per cent of the total cars moved during the period. In other words, slightly in excess of one-third of the cars moved in interstate commerce, exclusive of cars moved to or from points in Idaho on respondent's line to or from other points on respondent's line.

It is to be borne in mind that the foregoing figures only deal with carload shipments. There is no evidence in the record as to the quantity of less than carload shipments, so that they do not give a complete picture of the quantity of the freight business which is interstate as compared to intrastate, or of the freight business which is interchanged and that which is not.

QUESTIONS PRESENTED

While the errors relied upon by the petitioners are six in number as stated in their petition for writ of certiorari herein, they can be reduced, as we view it, to three: (1) that the trial court had no authority to determine independently on the evidence presented to it whether respondent is an interurban railroad, but is bound by the finding of the Interstate Commerce Commission that it is not, at least unless the finding of the Commission is not based upon substantial evidence, or is arbitrary or capricious; (2) that the finding by the Interstate Commerce Commission that respondent is not an interurban railroad is not "arbitrary, capricious, or without substantial evidence to support it"; (3) that, assuming the trial court had authority to determine the question independently, the finding of the trial court that respondent is an interurban railroad is not supported by the evidence introduced at the trial.

We shall consider these questions in this brief in their inverse order, because that is the order in which they arose in the trial court. [11]

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[11] It is to be borne in mind that the amended bill of complaint made no reference to the report of the Interstate Commerce Commission, but that report was pleaded as an affirmative defense by both petitioners.

SUMMARY OF ARGUMENT

I

The uncontradicted evidence introduced at the trial and re the Commission shows that respondent is an inter-n.

It is admitted that the respondent is an electric railway, that it is not operated as a part of a general steam-oad system of transportation, and that it is not any part he general steam-railroad system of transportation ated by any other motive power. The sole question, ming that the trial Court had a right to determine the tion before it on the evidence before it, is whether re-dent is an interurban railroad within the meaning of term as used in the proviso of Section 1, First, of the way Labor Act.

An interurban railroad is a railroad whose purpose is nder a type of transportation service, either passenger eight, which is distinct from that of any other type of sportation service, as for example, the transportation ice of the ordinary steam railroad, or that of the truck , and whose physical characteristics are such that it mited to rendering such service and, without being nstructed, cannot be transformed into any other type ansportation system. The uncontradicted evidence shows the purpose of the respondent as constructed, and as since maintained, is to render a type of service to the le of the territory it serves that is distinct from the type ervice rendered by any other type of transportation m, which is shown by the fact that it resulted from the nsion and connection of existing street car systems into gricultural sections far removed from the markets and rs of population, affording to the people of the territory d transportation at frequent intervals from one com-ity to another, and to the outside world, by means of t trains stopping at frequent intervals. In other words, nding what is practically street car service into the urban rural territory served, and encouraging the building ndustries upon its lines, such industries being the only stries possible in such a territory, namely, processing ts for the processing of agricultural products; collect-

ing and transporting such products of the soil as can be marketed without processing to the trunk lines for transportation by them to the outside markets; transporting such products as have to be processed to the processing plants, and after processing delivering them to the trunk lines for transportation to outside markets, and bringing into the territory materials needed by the processing plants in the processing of such products, and the freight and supplies needed by the farmers in the territory; all of such transportation service being rendered by the operation of short, but rapidly moving trains, making stops at practically every cross road (in other words, a peculiarly local service), and which was constructed and ever since been maintained with physical characteristics, each coordinated with the others, which limit it to the character of service which it is to provide, and without being entirely reconstructed it could not perform any other type of transportation service.

II

The finding by the Interstate Commerce Commission that respondent is not an electric interurban is arbitrary, not supported by the evidence, and is against and contrary to law.

Notwithstanding the uncontradicted evidence, as above outlined, the Interstate Commerce Commission found that the respondent is not an interurban railroad, and that finding is arbitrary, not supported by the evidence, and is against and contrary to law, (1) because it is based solely upon the fact that with no change in the peculiarly local service, both passenger and freight, which it renders the territory served by it, or in its physical characteristics which compel that type of service, its freight business, due solely to a cause beyond respondent's control, has come to preponderate over its passenger business, such preponderance being due wholly to the increase in travel by the people of the territory in privately owned automobiles, thus reducing respondent's passenger business. Such a factor or test under such circumstances is not relevant to the determination of whether respondent is an interurban, either in the sense as commonly understood by the public or as intended by the Congress, which has, in many statutes recognized that neither the

tity or character of the freight it transports prevents lroad from being an interurban.

(2). Because the respondent has been determined to n interurban railroad by other governmental agencies, by the Interstate Commerce Commission itself, and par- arly by reason of the fact that the Commission has per- d respondent to issue securities without the permission it that would be required if it were not an interurban.

III

The finding of the Interstate Commerce Commission that ondent is not an interurban railroad is not in any wise ing upon the Court:

1. Because the Congress in enacting the proviso has nly not manifested an intention that it should be binding, as evidenced in the Act itself a contrary intent.

2. Because, as pointed out in the majority opinion ered by the Circuit Court of Appeals, the Commission's ority does not extend to a determination as to respond- status as to being or not being an interurban railroad.

3. The Congress has not manifested its intention that determination of the Commission shall be binding upon Courts even if it was not arbitrary, capricious or not orted by substantial evidence.

4. That in the absence of express limitations, the Courts authority to try de novo the question as to the status spondent.

5. The question as to respondent's status as an inter- n is a mixed question of law and fact.

6. Because the constitutionality of the Railway Labor has been challenged in good faith by the respondent.

ARGUMENT

I

The uncontradicted evidence introduced at the trial shows that respondent is an electric interurban railroad.

It has been conceded throughout the case and it is now conceded that the respondent in the trial before the court proved that the threats of prosecution had been made by the petitioner Shields as alleged, and that the respondent would suffer irreparable injury and damage if it were held that the respondent was subject to the Act. It has also been conceded throughout the case and is now conceded that respondent is an electric railroad, and is not that type of interurban railroad that, notwithstanding its interurban character, is within the terms of the Act namely an interurban railroad "which is a part of a general steam-railroad transportation system," and likewise that it is not that type of interurban railroad which, notwithstanding its interurban character, is within the terms of the Act as being "any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power"; in other words, as applied to the situation here, that respondent is an independently owned and operated railroad, and is not the electrified part of a steam-railroad system of transportation.

The admission has not been so express on the part of the intervening petitioner (Interstate Commerce Commission) because some point has been made by it as to the use of the definite article in the phrase last quoted from the proviso, instead of the indefinite article. But the meaning of the phrase is clear in the light of the reason for its adoption, which was to prevent any steam railroad claiming that it had transformed itself into an interurban railroad by the use of motive power other than steam; though it would have been clearer if the word "that" instead of the word "the" had been used. But apart from this, all the way through, the intervening petitioner has conceded that the sole question is whether the respondent is an interurban railroad, and it has differed from the respondent only as to who shall finally make the determination, the Commission or the Courts.

Assuming then, that the Court had authority to determine the question as to whether respondent is an interurban railroad, without regard to the finding by the Commission, and the Court's finding in that respect is supported by the evidence introduced at the trial, the judgment must be affirmed, because upon this assumption, the only claimed error is with respect to this finding, and, unless there was error in this finding, (there being no error claimed as to any other finding) the judgment of the Court must be affirmed.

We have heretofore set out in detail all the evidence at the trial as to the status of the respondent. At its conclusion, the Court said he could not find otherwise than that the respondent is an interurban railroad, and did find that it is. [12]

Now, it is not quite clear as to why the petitioners (assuming the court had a right to determine the question independently) claim the court erred in making such a finding. True, they speak, as does the Interstate Commerce Commission in some of its decisions, notably in its later decisions which are cited by counsel, of interurban railways changing into railroads of the type of the ordinary steam railroad, as the Piedmont & Northern, which was considered by the Supreme Court of the United States in the case of *Piedmont & Northern Ry. Co. vs. Interstate Commerce Commission*, 286, *U. S.* 299, and will later herein be referred to, and we concede that an interurban railroad might so change its characteristics as to develop into a railroad of the type of the ordinary steam railroad, but so far as the respondent is concerned no such claim can be made. When it was built, it was but the extension of and the connecting of two street car systems, and as constructed had all the characteristics of an interurban railroad, rendering a service separate and distinct from the type of transportation service, both passenger and freight, furnished by the ordinary steam railroad, or by the particular steam railroad which it parallelled. The evidence as above outlined shows that it has never changed its original physical characteristics, or its type of operation

[12] The other evidence, consisting of exhibits and testimony introduced before the court, are not referred to herein, because it either did not bear upon the question of the status of the respondent, or was concerning matters of which the Commission had knowledge or of which it would take judicial notice.

or service rendered, and moreover that it could not, if it desired, transform itself into a railroad of the ordinary steam railroad type, so as to render that type of transportation service which is rendered by a steam railroad, without being rebuilt and relocated as well. In addition to being reconstructed, it would also have to be relocated in order to eliminate grades and curves and be rid of the necessity of using city and town streets as a right of way, with attendant franchise limitations appertaining thereto.

The only change in respondent's situation is the loss of passenger revenue, not because of any change in its physical characteristics, or its type of operation or service, but because of the public preferring another method of transportation, the use of the private automobile, so that the history of its building having shown that it was then an interurban, counsel would be forced, if they claim that it is now a railroad of the type of the ordinary steam railroad, to contend that instead of developing into such a railroad by transforming itself into one, it has shrunk into one, which is absurd. They also speak of the preponderance of freight revenue and advert to the percentage of that traffic which is interstate, but stop short of claiming that either is a determinative factor, or that both taken together are, probably because it is so obvious that they or either of them cannot be, for the reason that we would then have a railroad, which, with no change in its physical make-up, would or would not be an interurban, because of the manner in which the public uses its service. If passenger traffic falls off, though it be for a reason beyond the railroad's control, as for instance, because of the increase in the use of the private automobile, it loses its interurban character; if for some reason beyond its control it loses its freight business, as, for instance, by truck competition, then it is thereby changed back into an interurban, and no one could tell what it would be at any time in the future.

Moreover, assuming that the trial court had a right to determine the status of the respondent as to being an interurban railroad on the evidence before it, its finding that respondent was an interurban railroad exempt from the Railway Labor Act, which finding was concurred in by the Circuit Court of Appeals for the Tenth Circuit, by its affirmance of the judgment of the trial court, will not be reviewed

this court, unless this court determines as a matter law that the lower courts ascribed the wrong meaning to the term interurban, which, as we have shown, they not. *Virginian Railway Company vs. System Federation No.* 40, 300 *U. S.* 515, 542; *Texas & N. O. R. Co. vs. Brotherhood of R. & S. S. Clerks*, 281, *U. S.* 548, 558; *Pick Co. vs. General Motors Corp.*, 299 *U. S.* 3, 4, *ante* 4, 5; *Cincinnati, etc., Ry. Co. vs. Interstate Commerce Commission*, *U. S.* 184, 196; *Crowell vs. Benson*, 285 *U. S.* 22, 65.

II

The finding by the Interstate Commerce Commission respondent is not an electric interurban railroad is arbitrary, not supported by the evidence, and is against and contrary to law.

As has already been pointed out in the statement of the case, the petitioners pleaded the report which constituted determination of the Interstate. Commerce Commission the respondent is not an interurban railroad exempt from Railway Labor Act under the quoted proviso. So, when the trial respondent had rested its case, petitioners introduced in evidence the report of the Commission, (R. 146) which was all the evidence introduced in behalf of the petitioners, and that evidence was obviously introduced in support the allegations in the affirmative answers of petitioners "the Commission's determination that an electric railroad does not come within the proviso * * * * is controlling, was arbitrary; unreasonable or not based upon substantial evidence." In rebuttal of this evidence the respondent introduced in evidence the entire record of the hearing before Commission. As hereinbefore pointed out, that evidence consisted of a series of exhibits numbered 1 to 28, inclusive, explained by the general manager of the respondent, prepared them. The evidence introduced at the consisted of the same exhibits, with the exception of one numbered 28, the substance of which was, however, testified to by the same witness who explained the exhibits before the Commission. There was only one exhibit introduced at the trial which was not introduced before the Commission and which related to the status of respondent an interurban railroad, (Exhibit 8, R. 166-167) and certain evidence which was within the knowledge of the Commission, were concerning matters of which the Commission would take judicial notice. Exhibit 8 was introduced for the purpose

of showing that the electrical positive feeder and trolley circuit and the negative rail circuit used by the respondent was so limited that they are only sufficient to operate the locomotives with the practical rating capacity of the locomotives owned by respondent. In other words, the evidence was wholly cumulative, because the other physical characteristics of the railroad, apart from this limiting factor, necessarily limit the character of respondent's operations to that which is essentially different from that of the ordinary steam railroad. So that the evidence with relation to the status of respondent was practically the same both before the Court and before the Commission. Nevertheless the Court, as has already been pointed out, made separate findings in accordance with the issues with respect to the evidence before the Court and before the Commission. It found upon the evidence introduced before it upon the trial that the respondent is an interurban railroad; it found that the determination by the Commission that the respondent is not an interurban is "against and contrary to law." (R. 67.) It has been suggested by the petitioners that the Court disregarded the report by the Commission, but such is not the case, for, upon the issues made as to the effect of the Commission's determination, the Court made the foregoing finding wholly upon the evidence before the Commission. This is not only shown by the findings themselves, but by the statement of the Court at the trial. He said "I have intimated heretofore, as I now view it, if I make any findings with respect to the report of the Interstate Commerce Commission it will be based solely upon what was before them." (R. 79.) He had previously said "I am not going to consider the findings of the Interstate Commerce Commission except upon its own record." (R. 78.) It is reinforced by what he said at the conclusion of the trial as follows:

> "I will find as the fact in this case, both from the evidence introduced and also from the record submitted before the Commission, that this railroad, this line of the plaintiff company here, is a line of railroad operated by electric power; second that it is known as, and in fact is, an interurban electric railway which is not now and never has been operated as a part of a general steam railroad system of

transportation. * * * I cannot find anything else. That is clearly what the record shows—both records. It is only a question of conclusion of law whether or not from those findings you are entitled to a judgment as prayed. * * * I have found that it is a line of railroad, that it is an electric interurban railroad line, and that it is not any part of any general steam railroad. Now, I will also find, if necessary to include all the proviso, that it is not a railroad line that is operated by any other motive power than electricity. Now, they are the only items in the proviso. If you people want to think it over from that standpoint of those findings until morning, I will stay here with you and talk with you tomorrow morning about it. * * * I don't see how I can avoid making those findings upon the evidence, irrespective of which record you take, either the record made before me or the one made before the Commission. Unquestionably that is what they show."

This finding is attacked by the petitioners. We do not n it necessary to a determination of this case for this rt to determine whether it is subject to attack or not, use, as we shall hereafter attempt to show, the Court the right to make the finding as to the status of respondindependently of any determination by the Commission. if this Court should hold otherwise, then we say that finding by the Court is amply justified.

It is true that the petitioners have complained that ind of the Court finding that the determination of the mission was arbitrary or not supported by the evidence, ound it was "against and contrary to law"; but what erence does it make? If the determination of the Comion was based upon evidence which was irrelevant to ssue, it was against law; likewise, if it was not supported ny substantial evidence, because if the evidence is subtial it must be pertinent to the issue, it cannot be levant thereto, and necessarily if the Commission made finding solely upon irrelevant evidence, if it used as a rmining factor that which has no real bearing upon the e, then it is arbitrary, because the basis, or test, used is trary.

In the concurring opinion of Mr. Justice Brandeis in the case of *St. Joseph Stockyards Co. vs. United States*, 298 *U. S.* 37 (at page 74) the following appears:

> "Moreover, where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a State. Compare *Kansas City S. R. Co. vs. C. H. Albers Commission Co.*, 223 *U. S.* 573, 591; *Cedar Rapids Gaslight Co. vs. Cedar Rapids*, 223 *U. S.* 655, 668, 669. It may set aside an order for lack of findings necessary to support it, *Florida vs. United States*, 282 *U. S.* 194, 212-215; *or because* findings were made without evidence to support them, New England Divisions Case (*Akron, S. & Y. R. Co. vs. United States*), 261 *U. S.* 184, 203; Chicago Junction Case (*Baltimore & O. R. Co. vs. United States*), 264 *U. S.* 258, 262-266; or because the evidence was such "that it was impossible for a fairminded board to come to the result which was reached," *San Diego Land & Town Co. vs. Jasper*, 189 *U. S.* 439, 442; or because the order was based on evidence not legally cognizable, *United States vs. Abilene & S. R. Co.*, 265 *U. S.* 274, 286-290; or because facts and circumstances which ought to have been considered were excluded from consideration, *Interstate Commerce Commission vs. Northern P. R. Co.*, 216 *U. S.* 538, 544, 545; *Northern P. R. Co. vs. Department of Public Works*, 268 *U. S.* 39, 44; or because facts and circumstances were considered which could not legally influence the conclusion, *Interstate Commerce Commission vs. Diffenbaugh*, 222 *U. S.* 42, 46, 47; *Florida East Coast R. Co. vs. United States*, 234 *U. S.* 167, 187; or because it applied a rule thought wrong for determinating the value of the property, *St. Louis & O. R. Co. vs. United States*, 279 *U. S.* 461. These cases deal with errors of law or irregularities of procedure."

The Commission arrived at its determination that respondent is not an interurban railroad wholly and solely

ecause of the character and extent of its freight business s compared with its passenger business. In its report the Commission said, quoting from its decision in *Texas Electric Railway*, 208 *I. C. C.* 193, at page 202:

"'The Commission's views as to what constitutes an interurban were stated in Rules for Testing Other Than Steam Power Locomotives, supra. Those views should not be lightly departed from after Congress has authorized the Commission to determine the status of electric railways under a similar exemption provision in an act not otherwise administered by us. In harmony with that and similar decisions, we are of the opinion that an electric railway which is engaged in the general transportation of freight, whether the revenue therefrom is greater or less than its passenger revenue, which handles the bulk of such freight in standard equipment similar to that used by the steam railroads, which freely interchanges the same with the steam railroads for transportation to or from points on their lines, a considerable portion thereof being handled in interstate or foreign commerce, and which participates in joint rates with the steam railroads for interstate transportation, has more of the characteristics of a commercial railroad operated by electric power than of an interurban as that term is used in the exemption provision under consideration. Of course, there are many other circumstances and conditions which may have a bearing on the question, and some electric railways are of such an unusual character that their status might depend on other things, but we believe the factors referred to are generally the most important and should be given great weight where all of them exist together.'" (R. 51, 323; 214 I. C. C. 707, 714.)

The Commission also said in its report as to the status of respondent:

"The Utah Idaho Central was found not to be a street, suburban, or interurban electric railway within a similar exemption provision of the Locomotive Inspection Act in Rules for Testing Other than Steam

Power Locomotives, 122 I. C. C. 414. The appendix to that report shows that this carrier's freight revenues were less than double its passenger revenues during the years for which the figures were then given, 1923, 1924, and 1925, whereas the present record shows that its freight revenue was more than six times its passenger revenue in 1933 and 1934. Such previous decisions relating to the status of the same carrier under a similar exemption provision should not be lightly departed from in the absence of changed conditions, and such changes as have taken place with respect to this carrier tend to confirm and strengthen the conclusion that it is not a street, interurban, or suburban railway."

The Commission in its use of the above language and particularly in its reference to changed conditions as to revenues, accepts the conclusion which inevitably follows. If the character of revenue is to determine whether or not a particular railroad is an interurban, that it may be in certain periods an interurban and then, because of a change in the character of its revenue, in other periods be not an interurban railroad, notwithstanding there has been absolutely no change in its physical characteristics or the manner of its operations controlled thereby and the change in revenue is brought about by conditions over which the railroad has no control which, as we view it, conclusively demonstrates that such a test is not a proper one.

It will be observed that the two paragraphs above quoted from the Commission's report are not entirely consistent, because in the first paragraph quoted the Commission states that it makes no difference whether or not its freight revenue is greater than its passenger revenue in determining the question whether a particular railroad is an interurban railroad, and yet in the second paragraph it bases its decision as to the status of respondent upon the proposition that its freight revenue is greater than its passenger revenue; and this is reinforced by the final reason given in its report for holding that respondent is not an interurban railroad. It says "In all the Commission's decisions dealing with the status of electric railways under the same and similar exemption provisions it has never found one which derives so large a

proportion of its revenues from freight as this carrier does, to be an interurban." (R. 53, 325; 214 I. C. C. 707, 716.)

In this connection we deem it proper to point out that, notwithstanding what the Commission has said in the above quoted portions of its report, the Locomotive Inspection Act has an exemption provision similar to that contained in the Railway Labor Act and other acts exempting interurban railroads from their provisions, the fact is that the exemption provision in the Locomotive Inspection Act differs from the exemption provisions in all the other acts, as was conceded by the Commission in its decision *"In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power Other Than Steam Power, etc.,"* 122 *I. C. C.* 414, for in that decision the Commission said:

> "The first bill introduced, H. R. 5836, providing for amendment of the locomotive-inspection act in 1924, carried a provision amending section 2 of the act, and also provided that as amended it should 'not apply to and include an electric or gasoline motor car operated on a street, suburban, or interurban railway not operated as a part of a general steam railroad system of transportation.' Hearings were held before the committee on interstate and foreign commerce of the House of Representatives on that bill. The amendment, H. R. 8578, which was approved June 7, 1924, however, did not contain this provision. Instead, section 1 of the act was amended to read as follows:
>
> "That when used in this Act the terms 'carrier' and 'common carrier' mean a common carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation.
>
> "From section 1, as enacted, it seems clear that every carrier by railroad which is subject to the Interstate Commerce Act and which is not in strictness a street, suburban, or interurban electric railway, is subject to the locomotive-inspection act, as amended.

And even though it is a street, suburban, or in
urban electric railway, if it is operated as a part
a general railroad system of transportation, such a
tric railway is also within the scope of the locomoti
inspection act, as amended. Under the bill f
introduced, H. R. 5836, certain equipment
excepted although used on a street, suburban or in
urban railway, unless such railway was operated
a part of a 'general *steam* railroad' system of tra
portation. But the expression was changed and
word 'steam' eliminated. Evidently Congress inten
to include street, suburban, and interurban elec
railways if operated as a part of *any* general railr
system of transportation, otherwise the word 'ste
would not have been eliminated from the expressio

The matter was determined by the Commission, exc
as to those railroads which participated in the hearing, u
questionaires sent to the various electric railroads ask
only for information as to a comparison between their fre
and passenger revenue, and, so far as the respondent
concerned, that was all the evidence upon which the find
of the Commission was based, and that basis, as we h
shown, is not a proper basis for determining status as
being or not being an interurban, and while it is still
basis of the Commission in determining the status of
respondent, it is a basis which even the Commiss
as we have pointed out, has expressly repudiated. It
obvious that the Commission seized upon the peculiar word
of the statute as an excuse for extending its jurisdiction
include practically all locomotives used by electric railro
It being a safety measure for the protection of the employ
of the railroad, and therefore liberally to be constr
no objection was made by the respondent, or the other elec
railroads of the country, to having their locomotives sub
to the inspection law as a safety measure. And the deci
having been made upon a statute not like the one he
involved, it cannot be regarded as a precedent for the
struction of such a statute.

Now it being admitted, even by the Commission, that
preponderance of revenue, as between freight and passen
business, is not a factor by which to determine whethe

railroad is or is not an interurban, we shall proceed to consider the factors laid down by the Commission in the first above quoted paragraph of its report in the case of the respondent which it claims are determinative of whether or not a railroad is or is not an interurban. The Commission said that a railroad is not an interurban (1) if it is engaged in the general transportation of freight; (2) that it handles the bulk of such freight in standard equipment similar to that used by the steam railroads; (3) that it freely interchanges such standard equipment with steam railroads for transportation to or from points on their lines, a considerable portion of such freight being handled in interstate or foreign commerce; and (4) which participates in joint rates with the steam railroads for interstate transportation. That none of these factors can be considered determinative of the status of a railroad as to being or not being an interurban is settled, as we contend, beyond question.

Taking them up seriatim, the first is not (a) because, in the common understanding of the term interurban railroad there is not implied any inhibition against engaging in the general transportation of freight. From the time that such railroads came into existence many of what were known as interurbans were engaged in the general transportation of freight, Special Reports of the Bureau of Census, Street and Electric Railways, 1902, (R. 261-263), 1907 (R. 263-265). And from that time on the increase in freight business by interurbans was so notable as to be commented upon in the Special Reports of the Bureau of Census, Central Electric Light and Power Stations and Street and Electric Railways. (265-266.)

(b) The Interstate Commerce Commission itself, in a long series of decisions, specifically recognized that interurban electric railroads were extensively engaged in the business of transporting freight.

Chicago and Milwaukee Electric Railroad Co. vs. Illinois Central Railroad Co., 13 *I. C. C.* 20;

Cedar Rapids & Iowa City Railway and Light Co. vs. Chicago & Northwestern Ry. Co., 13 *I. C. C.* 250;

West End Improvement Corporation vs. Omaha & Council Bluffs Railway and Bridge Co., et al, 17 *I. C. C.* 239;

Cincinnati & Columbus Traction Co. vs. B. & O. Southwestern R. R. et al, 20 *I. C. C.* 486;

St. Louis, Springfield & Peoria R. R. et al vs. P. & P. U. Railway Co., 26 *I. C. C.* 226;

Louisville Board of Trade et al vs. Indianapolis, Columbus & Southern Traction Co. et al, 27 *I. C. C.* 499;

Michigan R. R. Co. vs. Pere Marquette R. R. Co. et al, 74 *I. C. C.* 496.

(c) Other governmental administrative bodies have so held, and particularly the Railroad Labor Board, established under Title III of the Transportation Act of 1920, which exempted from the Act interurban railroads in precisely the same language as used in the Railway Labor Act under consideration. (Decision No. 33, Docket No. 26 A.) See also the letter from Director General of Railroads showing that respondent was not subject to the Federal Control Act (R. 110). But what is more controlling is that Congress itself has continuously assumed that a railroad may be an interurban notwithstanding it is engaged in the general transportation of freight.

Section 15 (3) of the Interstate Commerce Act, approved in 1910, provides:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character";

Section 1 of the Federal Control Act, approved in March, 1918, provides:

> "Provided, however, that nothing in this paragraph shall be construed as including any street, or interurban electric railway which has as its principal source of operating revenue urban, suburban or interurban passenger traffic or sale of power, heat and light or both."

Sections 204 and 208 of the Transportation Act, 1920, contain almost identically the same language as Section 1 of the Federal Control Act.

Section 15a of the Interstate Commerce Act, before it was amended in June, 1933, provided:

> "* * *; the term 'carrier' means a carrier by railroad * * *, excluding * * * *, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight* * * *."
> (Italics ours.)

and Section 77(r) of the Bankruptcy Act, approved in March, 1933, and paragraph (m) which superseded paragraph (r) in August, 1935, reads as follows:

> "The term 'railroad corporation' * * * means any common carrier by railroad * * *, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard railroad freight equipment"

The second factor used by the Interstate Commerce Commission is not, (a), because nowhere can there be found any intimation in the common understanding of the term "interurban" there is implied any inhibition against the use of any particular equipment in the transportation of freight.

(b) It would be absurd to prevent interurbans from using standard equipment for the transportation of freight, because such a requirement would entail the necessity of transferring such freight received or forwarded to any steam line from the car in which it was being transported.

In 1910 it was proposed to amend the Interstate Commerce Act by inserting a provision giving the Interstate Commerce Commission the power to establish through routes and joint rates between carriers.

As the bill came before the Senate Committee on Interstate Commerce for hearing, it contained the following language:

> "The Commission shall not, however, establish any through route, classification, or rate between street, suburban, or interurban electric passenger railways and railways of a different character."
> Senate hearings, Vol. 18, pp. 1027-1042.

Various parties appeared before the Senate Committee and urged that interurban electric railways performed a freight business and that such lines should be included within the Commission's power to require the establishment of through routes and joint rates. In the discussions before the Committee, it was shown that the foregoing quoted language as proposed would exclude interurban electric railways doing a freight business. The Senate Committee accepted this viewpoint of the witnesses, and, as the amendment was finally adopted and is still in the Interstate Commerce Act as a part of Section 15 (3), the Commission was left with jurisdiction to prescribe through routes and joint rates between steam railroads and interurban electric railways engaged in the general transportation of freight. The provision adopted at that time as part of Section 15 (3) is as follows:

> "The Commission shall not, however, establish any through route, classification or practice, or any rate, fare or charge between street electric passenger railways not engaged in the general business of transporting freight, in addition to their passenger and express business, and railroads of a different character."

This provision has been enforced by the Interstate Commerce Commission in many cases. *St. Louis, Springfield & Peoria Railroad et al.; vs. Peoria & Pekin Union Railway Co.*, 26, *I. C. C.* 226, *Louisville Board of Trade et al., vs. Indianapolis, Columbus and Southern Traction Company et al* 27 *I. C. C.* 499, *Chicago, Ottawa & Peoria Railway Co. vs. Chicago & Northwestern Ry. Co. et al.*, 33 *I. C. C.* 574. In the latter case the Commission said:

> "Our authority upon a proper showing to require the establishment by steam railroads of through routes

and joint rates with interurban electric railroads engaged in the interstate transportation of freight has long been settled." (Citing cases.)

Of course, it would be absurd to establish through tes and joint rates between interurbans and other railds without using standard equipment, and the fact it is nsive, or otherwise, could not have the effect of transming what would otherwise be an interurban into any er type of railroad.

(c) There is no evidence in this case that the rendent handles the bulk of its freight in standard equipment, there is no evidence as to the comparative bulk of its load business with its less than carload business, and the dence is that the less than carload business is transported the same type of equipment as its baggage and express transported.

(d) The Congress has expressly recognized that a railad may derive more than fifty per cent of its operating venue from the transportation of freight in standard steam ilroad freight equipment, (Section 77 (r) (m), as amended, the Bankruptcy Act, supra), and the amendment was ssed after the enactment of the Railway Labor Act here in estion.

The third factor relied upon by the Interstate Commerce ommission is not determinative, (a) because it is too indefite to afford any reasonable or intelligent basis, for what ight be a considerable portion in one man's mind might be considerable in another's, and what would be considerable one railroad would not be on another; (b) the amount freight that moves in interstate commerce depends not any change in the physical characteristics of the railroad, t on the extent to which the public may use its facilities in a rticular movement over which the railroad has no control; c) if adopted as a test it would result in the railroad changing s character from time to time without any change in its hysical characteristics or operations, depending on whether considerable portion of its exchanged freight moves in terstate commerce, and no one could determine in advance s to what its status as to being an interurban would be at ny particular time; (d) the railroad as a common carrier

is in duty bound to interchange such freight—indeed might be compelled to do so. All interurban electric railways engaged in interstate commerce are subject to the Interstate Commerce Act, and to the jurisdiction of the Commission except where exempted. *United States vs. Village of Hubbard, Ohio*, 266 *U. S.* 474. Paragraph 4 of Section 1 of the Interstate Commerce Act (Part I) provides:

> "It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable requests therefor and to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes * * * * *."

Paragraph (3) of Section 3 of the Interstate Commerce Act, (Part I) provides:

> "All carriers, engaged in the transportation of passengers or property, subject to the provisions of this part, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines * * * * *."

To say that the performance of that duty which is enjoined by law, would change the railroad's character, although its physical characteristics and operations remain the same, would be anomalous. (e) It is adopting a test which has never been adopted by Congress, but one which that body has rejected and still continues to reject.

The fourth factor relied upon by the Commission is not determinative, (a) because, as we have pointed out, the respondent is in duty bound under the law to establish such joint rates; (b), business which it is contemplated by law shall be interchanged cannot be interchanged without such joint rates, as well as through routes; and (c), as already pointed out, the Commission has consistently upheld its jurisdiction to compel the establishment of through routes and rates between steam and interurban lines engaged in the transportation of freight; and (d), this Court has held in *U. S. vs. Chicago, North Shore & Milwaukee Ry. Co.*, 288 *U. S.* 1, that an electric line which had in effect

206 tariffs in which it participated as an initial carrier, and over 800 tariffs in which it participated as a delivering or intermediate carrier, in conjunction with standard steam railroads, was nevertheless an interurban railroad.

It will be observed that the Commission in the quoted paragraph from its decision in the *Rules for Testing other than Steam Power Locomotives, supra,* say that an electric line in which all the factors above enumerated appear partakes more of the characteristics of a "commercial" railroad operated by electric power than an interurban, but there is no mention, either in the Locomotive Inspection Act or in any other act excluding interurbans from their provisions of the term "commercial railroad." The Commission coined this term, not as meaning a railroad engaged in commerce, which is its real meaning, but as meaning a railroad engaged in the general transportation of freight. Thus the Commission sought by giving that meaning to the carriers included within the Act, as contradistinguished from interurbans, to extend its jurisdiction to include freight carrying interurbans, the Commission in its annual report to Congress in 1922 said:

> "Under the law as it now stands, we have no jurisdiction over * * (an) interurban electric railway * *. Some electric lines correspond substantially to steam roads in all important particulars except that of motive power. Unless such lines are held not to be 'street, suburban or interurban' electric railways, they are not subject to our jurisdiction. * * *."

So, here is definitely shown the origin of the idea that these electric railways could be brought within the Commission's jurisdiction by holding that they are "not interurban" electric railways, merely because of their freight business.

Although the factors stated in *Rules for Testing other than Steam Power Locomotives, supra,* were not formerly announced until that decision was rendered in 1927, the Commission, as pointed out by petitioners, had intimated in two previous cases that an electric railroad might be held not to be an interurban because of the character of its freight business—*Proposed Control of Sacramento Northern Railway by Western Pacific Railroad,* 71 *I. C. C.* 656 (1922), 79 *I. C. C.* 782 (1923)—but in those cases the Commission

was dealing with the case of an electric railroad, the control and ownership of which was sought by a steam railroad system, namely the Western Pacific, so that it was unnecessary to decide what effect its freight business might have upon its status as an interurban.

Indeed, never prior to the decision in *Rules for Testing Other than Steam Power Locomotives*, *supra*, had the Commission considered the factors therein enumerated as decisive of the status of a railway as to its being an interurban. On the contrary, in *Application of Section 15(a) of the Interstate Commerce Act to Electric Railways*, 86 *I. C. C.* 751, (1924), the Commission had occasion to construe Section 15 (a) which became a part of the Interstate Commerce Act by the Transportation Act, and was commonly known as the "recapture section," and provided for a fair return to railroad companies and a recapture of excess income by the Interstate Commerce Commission. Excluded from Paragraph 1 of that Section were:

> "(c) Interurban electric railways operated as a part of a general steam railroad system of transportation, or engaged in the general transportation of freight;"

In that case the Commission recognized the fact that many of these electric lines designated in the language of this section of the act as "interurban electric railways" were in fact, heavy freight carrying railways, because this language was used:

> "Interurban electric railways closely resemble steam roads in some particulars of freight transportation and are not greatly dissimilar in others."

At page 753 the following may be found, which emphasizes that the distinguishing characteristics of interurban electric railways, as contended for by us, were still fully in the minds of the Commission in the decision in this case, notwithstanding its efforts to get away from them:

> "Between steam roads and most interurban electric roads there exists a wide distinction in methods of operation and in physical and other characteristics."

Then there is set out the differences with regard to rights of way, the character of traffic, the use of public streets by interurbans, the nature of the construction, and the local regulations which prevent complete use of steam railroad equipment on the interurban lines. The matters of wages and operating expenses are mentioned as a "further disparity" and the Commission concludes:

> "Considering the responsibilities as well as the benefits of carriers under Section 15a, it seems clear that Congress intended to exclude interurban electric railways generally from its operation and to include them only when engaged in such general transportation of freight as would cause them to resemble steam roads in the performance of that function."

In the light of the foregoing language, can it be successfully contended that the Interstate Commerce Commission in 1924, the date of such decision, did not at that time understand the term "interurban electric railway," as used by Congress, includes such railways "when engaged in such general transportation of freight as to cause them to resemble steam roads in the performance of that function?"

In passing this particular case, reference should be made to the limited quotation from this case contained in the brief of petitioners, found on page 49, which is claimed to sustain the proposition that the relationship of freight to passenger revenue has a bearing in determining the status of a railroad, but taken in connection with the other language herein quoted, it has no such meaning as claimed by them.

Furthermore, in the Commission's annual report to Congress, dated December 1, 1924, specific mention is made of the foregoing case with regard to the application of Section 15a and again in its report to Congress in December, 1925, December, 1926, December, 1927 and December, 1928, specific reference is made to that case and the application of Section 15a to electric railways.

In its annual report to Congress, dated December 1, 1928, extensive reference is made to the various provisions of the Interstate Commerce Act excluding certain types of electric railways. After setting out the various sections in which

the exclusions occur, the Commission uses this very significant language:

> "In the construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways. Practically all of the interurban electric lines of the country are engaged to a greater or less extent in the transportation of freight. * * * Certain electric railway lines for many years have engaged largely in freight transportation, their business being substantially the same as that of steam railroads, the only material difference being in motive power. Where the functions of an electric line are substantially the same as those of an ordinary steam railroad, the public interest would seem to justify the exercise of our jurisdiction * * * to the same extent as in the case of steam railroads. However, the greatly varying circumstances of electric lines indicate the necessity of individual treatment. It is recommended that, instead of attempting to define the classes of electric lines that are exempt from our jurisdiction under the several provisions in question, a general exemption of all electric lines be substituted, excepting such lines as interchange standard freight equipment with steam railroad lines and participate in through interstate freight rates with such lines."

After reading this specific recommendation of the Commission to Congress in December, 1928, may it be truthfully asserted that the Commission did not understand that the term "interurban electric railways" as used generally included interurban railroads, notwithstanding they were engaged in the general freight business? Here was a specific recommendation to Congress, based upon what the Commission considered the public interest, asking that interurban electric railways be held subject to their jurisdiction, if engaged in the general transportation of freight. But the Congress took no action at that time or at any subsequent time to comply with the Commission's recommendations, but the Congress did pass a statute in the year 1933, namely Section 77 (R) of the Bankruptcy Act amended in 1935, *supra*, which proved conclusively that it had no intention

of adopting the Commission's recommendations with regard to the meaning of the term "interurban electric railway."

In its annual report to the Congress, dated November 30, 1929, the Commission again recommended the adoption of its plan contained in its previous years' recommendations for the classification of electric railways, that is, amendments exempting all electric railways, except such as interchange standard freight equipment with steam railroads and participate in through interstate freight rates with such carriers.

In its annual report to the Congress, dated December 1, 1930, the Commission renewed its recommendations with regard to the adoption of new exclusion language concerning electric railways.

In its annual report of December, 1931, and again in its annual report for 1932, it renewed the same recommendations.

In its annual report in December, 1933, it made no recommendations, because of the fact that the law had created the office of Federal Coordinator of Transportation, which provided for recommendations from the Coordinator to be transmitted to the Congress, and not having received the Coordinator's recommendations the Commission made none.

In June, 1933, Congress amended Section 19a of the Interstate Commerce Act, which provided for the valuation of the property of carriers in the following language:

> The Commission "shall * * * * (value) all property owned or used by every common carrier subject to the provisions of this chapter, except any street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation; but the Commission may, in its discretion, investigate, ascertain and report the value of the property owned or used by any such electric railway subject to the provisions of this chapter whenever, in its judgment, such action is desirable in the public interest."

The Commission has not undertaken to value any of the interurban electric railways, including respondent, although

if respondent is not an interurban it is the duty of the Commission to value it, and the Commission has clearly violated its duty in this respect.

Again, in December, 1934, in its annual report to Congress, the Commission refrained from making a recommendation because of the fact that the Coordinator had not submitted a report to it.

In its annual report to Congress, dated December, 1935, the Commission described its jurisdiction over electric railways and called attention to previous recommendations made that the Congress substitute exemption language for that contained in the various provisions of the Interstate Commerce Act and it recommended specifically that Congress adopt its suggested revision of the exclusion language in the various sections of the Interstate Commerce Act.

So, then, in each year from 1921 to 1935, inclusive, in which it made a report to Congress, the Commission has reported to Congress with regard to this matter of electric railway exclusion. It has consistently and constantly recommended that Congress make some change in the statute to meet the wishes of the Commission. Congress, however, has constantly refused to act upon the Commission's recommendations, and, so far as the meaning of the term "interurban electric railway" is concerned, it stands exactly as it has always stood from the inception of these interurban electric lines down to the present date, with the exception of certain inconsistent decisions of the Interstate Commerce Commission itself, based upon its own desire to take jurisdiction of these properties, as revealed by its report to Congress in December, 1928, hereinbefore referred to.

On the contrary, Congress not only has not followed the Commission's recommendations with regard to a change of the exclusion language to meet the Commission's wishes, but by the adoption of Section 77 (m) of the Bankruptcy Act, *supra*, in August, 1935, Congress specifically recognised that an interurban electric railway might derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad freight equipment.

After this long history of legislative action culminating in the passage of the Bankruptcy Act in March, 1933, can

there be any question that Congress has expressly decided that an interurban electric railway may transact an unusually large freight business, even to the point of deriving more revenue from the transportation of freight than it does from any other source, and irrespective of its intra- or inter-state character? Congress specifically said so in the Federal Control Act in 1918, in Section 204 and 209 of the Transportation Act, 1920, and in paragraph (r) of Section 77 of the Bankruptcy Act in 1933, and in Section 77 (m) of the Bankruptcy Act in 1935. All of these statutes, specifically stating as they do that interurban electric railways may derive a large portion of their revenues from the transportation of freight merely confirm and emphasize that the handling of freight or its character or the amount thereof is not a determining factor in determining whether a railroad is an interurban.

Yet in the brief of the petitioners (page 17 thereof), the petitioners argue that Congress in enacting the Railway Labor Act "approved the principles which the Commission had previously followed," as announced in respondent's case before it, whereas the truth is that the Commission was in its annual reports, continually begging Congress to justify such decisions by amending the exclusion provisions of the various Acts, because the Commission recognized that under such exclusion provisions it had no authority as it was doing to hold the electric railroads, including respondent, not to be interurbans solely because of the character or quantity of their freight business.

Petitioners further say that during the twelve years prior to the 1934 Railway Labor Act "the Commission had consistently interpreted the phrase 'interurban electric railway' as not including electric lines engaged to a large extent in the transportation of freight in the same equipment as the steam roads and interchanging such freight with the steam roads" (page 17 of petitioners' brief). Yet on October 29, 1926, in *Interstate Public Service Company Case*, 117 *I. C. C.* 228, the Interstate Public Service Company was found, in a formal case, not to be subject to the provisions of Section 15a of the Interstate Commerce Act, because it was not engaged in the general transportation of freight, whereas three and one-half months later, on February 17, 1927, in the Locomotive Inspection decision, this same company was found not to be

an interurban electric railway. Here are two different decisions with regard to the same property, within the space of three and one-half months, which were wholly inconsistent.

Petitioners claim that this Court has also held that the extent and character of an electric railway's freight business is a factor determinative of its status as to being an interurban railroad. However, in the case of *Spokane & Inland Empire R. R. Co. vs. U. S.*, 241 *U. S.* 344, this Court recognized that the term "interurban electric railway" included a freight carrying road. The opinion says:

> "The railroad company operated a street railway system in Spokane, Washington, and several interurban electric lines, one of which extended from Spokane to Coeur d'Alene, Idaho, a distance of about 40 miles. Over this line passenger trains composed of two or more cars were operated, starting at a station near the center of Spokane and running for a mile and a quarter on the street railway tracks to the company's yards near the city limits, and thence over its private right of way to Coeur d'Alene. The road was standard gauge with rails of standard weight and the passenger trains were made up according to standard railroad rules, with markers to designate the trains, and were run on schedules and by train orders. Passengers traveled on tickets entitling them to ride to and from designated stations at which regular stops were made and express matter and baggage were carried on the passenger trains. The street car business was entirely separate from that done by the interurban line, the employes of the one having nothing whatever to do with the other, and although stops were made by interurban trains within the city limits and while on the street railway tracks, they were made solely for the purpose of taking on and letting off passengers to or from stations outside the city. In addition to its passenger trains, the interurban line also operated freight trains, which, however, started from the company's yards and ran directly to Coeur d'Alene and did not therefore enter upon the street railway tracks."

Apart from this case two cases involving two different sections of the Interstate Commerce Act have been decided by this Court. Petitioners quote extensively from one of these cases, *Piedmont & Northern vs. I. C. C.*, 286 U. S. 299, *supra*. Such quotations, however, disregard the basic principles which the court set out as controlling in that case. That was a case arising under Section 1 (22) of the Interstate Commerce Act, which requires a certificate of convenience and necessity from the Interstate Commerce Commission before the construction of any new line of railroad, but excepts interurbans from its provisions. Piedmont & Northern was intending to extend its lines materially and as to this the court found that such proposed new construction without permission of the Commission would be in direct violation of the policy of the Transportation Act, 1920.

The court, speaking through Mr. Justice Roberts, said:

"In *Texas and P. R. Co. vs. Gulf C. & S. Ry. Co.*, 270 *U. S.* 266, the court announced the guiding principles to be followed in construing the very paragraph involved in the case at bar. As there indicated, the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. Accordingly, a track seven miles in length, proposed to be constructed to reach industries in territory not theretofore served by the railroad, and which would take away from a competitor much of the traffic then enjoyed, was held not to be an 'industrial track,' as that phrase is used in paragraph (22), although by strict construction it was such."

The court further said:

"Thus it would become a connecting link in a new through route and effective line of connecting carriers which would be strongly competitive with existing trunk lines, leading from Florida and the southeast to the northern gateways * * * * ."

"Petitioner's own estimate contained in its application to the Commission is that the extension would

gain new business diverted from steam railroads of 82,320 cars a year. * * * "

These quotations from the court's decision are clearly the basic factors on which the decision was predicated. It is a clear case of an interurban attempting to transform itself into a railroad of the ordinary steam railroad type. This is emphasized by the decision in the other case that went to the Supreme Court in regard to the exclusion language of Section 20a,—*United States vs. Chicago, North Shore & Milwaukee R. R. Co.*, 288 *U. S.* 1. In that case the Supreme Court referred to the former case of the Piedmont & Northern, supra, and said:

> "The facts differentiate the present case from *Piedmont & Northern Ry. Co. vs. I. C. C.*, 286 *U. S.* 299. There the railway was predominantly a carrier of interchange carload freight and the proposed extension of line which was the subject of that litigation had as its object the creation of a link in a trunk line route composed of the electric line and a number of steam railroads, which would divert from other steam railroad trunk-line routes some $4,000,000 of revenue annually."

By this reference in the North Shore case decision to the Piedmont & Northern case decision, the court itself distinctly holds that the Piedmont & Northern's position was determined solely under the exclusion language of Section 1 of the Interstate Commerce Act, and that the extensions proposed to that railroad would have been a violation of the policy and purposes of the Transportation Act with regard to the extension of lines, and therefore limited the effect of that decision to the precise question before the court.

In the North Shore case, as we shall hereinafter point out, the ground upon which the case turned was that the Commission had by settled administrative construction classified the railroad as an interurban. The court makes reference to the findings made by the trial court, not quoting them, but they are herein set out:

> "Congress * * * described these railways as street, suburban and interurban electric railways * * *

and by doing so adopted a descriptive term which had the sanction of time and common usage. Among the common characteristics * * * are that they use electric power in the transportation of passengers or freight or both, in intrastate and interstate commerce, occupy city streets and highways in addition to private rights of way, stop cars or trains at street intersections and country highways for the reception and discharge of passengers, maintain loading platforms and shelter sheds without agents for passengers; have short radius curves and operate part of their system under municipal and village franchise authority and restrictions." (Docket 10,067.)

The Supreme Court in its decision used this language with regard to the foregoing findings:

"The District Court, after making detailed and elaborate fact findings, concluded as a matter of law that the railway was an independently operated electric interurban railway expressly excepted from the requirements of the section (that is Section 20a, having the same exclusion language), the question is whether the facts found warrant the decision."

Incidentally the Supreme Court held that the amount of freight handled is not a determining factor. In stating the facts with respect to the road's handling freight, the court said:

"Appellee's tracks are of standard gauge, and are physically connected with those of four steam railroads at some thirteen points, and with those of three electric lines. Eight connections are used for handling inter-change carload freight. The railroad has substantial facilities for serving various industries located on its lines, such as side, industrial, team and switch tracks, and freight classification tracks. It owns seven electric locomotives which are of a small type and unable to haul freight trains of the size usually employed by steam railroads, and 114 freight cars which have no electrical equipment and are interchangeable with steam railroads. Sixteen local freight tariffs are published; in 206 tariffs the

railroad participates as initial c. ier, and in more than 800 as a delivering or intermediate carrier, in conjunction with steam railroads.

"The total transportation revenue in 1930 was over $6,000,000, about 76 per cent from passenger traffic and about 22 per cent from freight. This ratio has been substantially maintained for some years. In 1930, 87 per cent of carload freight traffic was interchange and 78 per cent of all freight traffic was interline, but only 42 per cent of freight revenue was derived from interline business.

"Locomotives are not employed in the passenger service, the cars having installed electrical equipment and being somewhat shorter and narrower than standard passenger railroad coaches. Freight is hauled by electric locomotives. A merchandise package delivery freight service is supplied by cars similar to baggage cars used on steam railroads, having self contained electric equipment, operated from the loop in Chicago to Milwaukee in trains of from one to five cars. At certain points gantlet tracks are required for handling freight cars, as the clearances on the main line are insufficient to permit their passage. Grades are much heavier than those customary on steam railroads, and some of the curves are of so short a radius as not to permit the passage of a steam locomotive. The company maintains no facilities for receipt or delivery of carload freight at its terminii in Chicago and Milwaukee, and cannot accomplish interchange of such freight at either, connections for this purpose being outside those cities."

After the court Stated these facts the opinion continues:

"We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interferring with performance of the main purpose of the carrier."

The history of the respondent is slightly different from that of the North Shore. It was constructed, it is true, to give a typically interurban passenger service, but at the

same time a typically interurban freight service of a purely local character. Incidental to that service, it was necessary to interchange freight in carload lots, and a small percentage of that interchanged freight may not be directly connected with the local purpose, but clearly it is incidental to it, and no claim is made that hauling of freight interfered with the road's performance of its passenger function.

The only reason, however, that the history of the respondent is in any wise different from that of the North Shore is that it was constructed to serve a territory which was purely agricultural in character and more sparsely settled, and the population could only be increased by a more intensive agricultural development, so that it was necessary for the respondent from the very onset to render not only an additional freight service to that which had been furnished by the then existing steam transportation railroad, but a service which was as distinctly interurban in character as the passenger service furnished by the respondent.

In its decisions with respect to respondent the Interstate Commerce Commission has been as inconsistent as with respect to other electric railways. In *Rules for Testing Other than Steam Power Locomotives, supra,* it held under an exception provision dissimilar to that involved in the Act herein in question (and involving a safety measure) that respondent was not an interurban railroad, but the respondent has, except for that, continuously been held by the Commission to be an interurban railroad. It is now, and has been continuously, receiving pay for the transportation of mail as an interurban railroad under the decisions of the Commission. In the year 1918 Congress enacted a statute covering railway mail pay service on urban and interurban electric railways (40 Stat. L. 748). This Act empowered the Commission:

> "to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of mail matter by urban and interurban electric railway common carriers."

Two years prior to the passage of this Act, that is, in the year 1916, Congress had passed the Railway Mail Service Pay Act applicable to transportation of mail matter by rail-

way common carriers (39 Stat. L. 412). In a formal case, to which respondent was a party, the Commission refused to classify interurban electric railways as "railway common carriers," but instead held all of the electric railways of the country, except electrified sections of steam railroads, subject to the provisions of the statute of July, 1918, (40 Stat. L. 748), which covered railway mail pay service on urban and interurban electric railways. (58 I. C. C. 455.) In the decision of that case, known as the *Electric Railway Mail Pay case*, the Commission, among other things, said:

> "Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like the steam roads so far as mail transportation is concerned. Many of them do considerable freight and express business, in addition to their passenger business. * * * A few lines receive greater revenue from freight and express than from passenger business."

In a second *Electric Railway Mail Pay* case, (98 I. C. C. 737), decided June 2, 1925, the Commission used this language:

> "Mail service is now authorized in the lines of 311 urban and interurban electric railway companies."

So, we have the Commission in both of these electric railway mail pay cases recognizing the meaning of the term "interurban electric railway," as including electric railways, whose revenue from freight exceeds that from passengers, including respondent, and it is in accordance with that decision that respondent has received and is receiving its pay for carrying mail (R. 95).

Moreover, during the entire period of its existence, respondent has continuously reported to the Commission its operations, not in the manner prescribed for railroads of the type of ordinary steam railroads, but in the manner prescribed for electric railroads, and certainly it is anomalous for the Commission to say suddenly, without any change in its character, it is a "commercial railroad" as the Commission uses that term, meaning thereby, that it is a railroad of the type of the ordinary steam type and should have been reporting as such. (R. 117-119.)

Finally. Respondent was reorganized out of receivership and issued 20,000 shares of non-par common stock and two million dollars in first mortgage bonds in the year 1926, without the authority and approval of the Interstate Commerce Commission as is required by Section 20a of the Interstate Commerce Act, if respondent is not an interurban electric railway. Under Section 20a such security issues are void (unless respondent is an interurban electric railway and thus exempted from the provisions of the section) and its officers and directors issuing the same are subject to penalties. Respondent believing itself to be an interurban electric railway and therefore not subject to the provisions of Section 20a, did not request approval of the Commission for the issuance of such securities.

The issue of these securities, however, was reported to the Interstate Commerce Commission on respondent's annual report form "G," and in the report, which was filed with the Commission on or about April 1, 1927, under the heading of "Explanatory Remarks," an attachment was made, explaining the set-up of the new company and its acquirement of the physical properties of the old company. Nearly a year later, the Director of Statistics asked for further information with regard to the sale of the property and the securities issued and such Director referred specifically to the pages of respondent's formal report, which is required from all common carriers generally subject to the Interstate Commerce Act.

There ensued over a period of more than two additional years correspondence between respondent's representatives and the Commission's representatives with regard to the method of accounting that respondent would be required to follow in showing on its books the reorganization of the company out of receivership and the issuance of the securities. In none of this correspondence, running over a period of three years or thereabouts, did the Commission make a single objection to the fact that the respondent did not request and receive authority for the issuance of the securities under Section 20a.

With as much involved as there was, were this respondent not an interurban electric railway and therefore subject to

Section 20a, it would seem almost unthinkable that the Commission, not having ever complained, could now determine under another statute with the same exemption provision that this respondent is not an interurban electric railway. If such determination is right at this time, then it would have been right at the time this matter of security issues and reorganization out of receivership was before the Commission in the correspondence mentioned.

Thus, this case comes squarely within the decision of this Court in the case of *United States vs. Chicago, North Shore & Milwaukee R. C., supra,* wherein this Court said:

> "The required annual reports filed by the appellee (the Chicago, North Shore and Milwaukee Railroad) with the Commission have shown all securities issued since March 1, 1920. * * * With this knowledge of the situation, the Commission never, until it requested the Attorney General to institute the present suit, by word or act, intimated that the procedure followed by the Railroad was illegal. * * * It would be difficult, indeed, to conceive a clearer case of uniform administrative construction of Section 20a as applied to this company. * * * The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under Section 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has, for more than decade, resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory to this settled administrative interpretation."

Petitioners make some point of the fact that there was no "affirmative or considered ruling by the Commission regarding it as an interurban," but neither was there in the North Shore case, and it certainly was arbitrary on the part of the Commission to hold when this case was before it that now the respondent is not an interurban railroad, when it had during all these years acquiesced in the issuance of these securities, which would be void if it were not an inter-

urban railroad exempt from the necessity of securing permission from the Commission to issue them.

In addition to the foregoing, no claim is made or can be made that there was any evidence before the Commission which showed or even tended to show that the respondent was not an interurban, except that relating to its freight business, nor can it be claimed that the manner in which the respondent was engaged in the freight business was not solely what caused the Commission to make its finding.

But the true test of whether the respondent is or is not an interurban is not the amount of freight it handles, nor the character of it, but whether its physical characteristics are such as to inhibit it from rendering that type of transportation service such as is rendered by an ordinary steam railroad and compels it to render no more than that type of transportation service ordinarily rendered by an interurban railroad; that the evidence as to the amount of freight carried by the railroads, or its character, as to being interstate or intrastate, has no bearing on that issue, and that a finding based upon such service is at the same time contrary to and against law, it is arbitrary, and it is without substantial evidence to support it.

There is, as we contend, no doubt as to the meaning of the term "electric interurban railroad" either in the common understanding of the term, or as defined by Congress; that what distinguishes them as interurbans is their physical characteristics, which necessarily combine to produce a type of transportation unit in the transportation system of the country as distinctive as any other type, and that the service they render the public is as distinctive as any transportation service rendered by any other type of transportation unit. But we say also that the efforts of the later Interstate Commerce Commission decisions, and the attempt of petitioners in support of the Commission in its efforts to change that meaning from that which is commonly understood and to say that because its revenue from its freight business is larger than that from its passenger business, or because such a railroad handles its freight in standard car equipment similar to that used by steam railroads, or because it interchanges the same with steam railroads, or because it participates in joint rates

with steam railroads, or because it is engaged in the general transportation of freight, or because a considerable portion of its freight moves in interstate commerce, notwithstanding its physical characteristics remain unchanged, are not only unwarranted by any common understanding of the meaning of the term, but are in the teeth of congressional determination. We have heretofore quoted these various sections of the Acts of Congress in their exact language, as sections excluding certain electric interurban railroads from the operation of various laws, but let us now state them affirmatively instead of negatively. Congress, then, has said that an interurban electric railroad may have freight business as its principal source of revenue, and still be an interurban electric railroad, (U. S. C. A., Title 49, Section 73a, 77a, Section 77 (r) of the Bankruptcy Act of March, 1933, and 77 (m) of the Act of August, 1935,), that an electric interurban railroad may use standard steam railroad cars in the transportation of freight, (Section 77 (r) and (m) of the Bankruptcy Act) and still be an interurban electric railroad; it not only may, but it may be compelled to interchange its freight with steam lines, (U. S. C. A. Title 49, Section 15(3), and still be an interurban electric railroad; it may not only have joint rates with steam railroads, it may be compelled to have them (U. S. C. A. Title 49, Section 15(3), and still be an interurban railroad and it may be engaged in the general transportation of freight (U. S. C. A. Title 49, Section 1(4) and still be an interurban, and if it may engage in the general transportation of freight, without limitation as to its character, and none is placed in the Act, a considerable or any portion of such transportation may be interstate.[12]

If notwithstanding such an express determination by Congress that an interurban railroad may be such, irrespective of the amount, the character, or its manner of handling freight, or its relationship to its passenger business, then the Interstate Commerce Commission can take the fact with relationship to its freight business of any particular railroad, as it has done as to this railroad and others, and determine

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[12] In the Act here in question, it is provided that an electric interurban railroad may be part of a general steam-railroad system of transportation and, of course the converse is true, it may be engaged in the general transportation of freight and not be a part of a steam railroad system.

because thereof it is not an interurban railroad, though
of a change with respect to its freight business it
be an interurban, and later, though one fact may be
determinative as to this interurban railroad and
to another, and today this fact may be determina-
and tomorrow another, in the case of the same railroad,
we say one of two conclusions irresistibly follows, that
a determination is contrary to and against law, or that,
claimed by the Commission in its reports to Congress,
is no such fixed definition of the term "electric inter-
railroad" that by the use of it any standard or yard-
is furnished by Congress to the Interstate Commerce
mission by which to determine the matter, and that by
ferring the Commission to determine it without having
such a standard, Congress has, to use the language of
Justice Hughes, transcended "the limitations of author-
to delegate, if our constitutional system is to be main-
ed," or to use the language of Justice Cardoza, such dele-
ed power to the Commission is "not canalized within
nks that keep it from overflowing," and "it is unconfined
l vagrant." *Schechter vs. United States*, 295 *U. S.* 495.
pecially do we say that if in this case the respondent's
of railroad, built as an interurban railroad and never
anged, can by the finding of the Commission be transformed,
ely because by the development of another type of trans-
rtation it has lost a portion of its passenger business,
en a large portion, from an interurban railroad into a
ilroad of the type of a steam railroad, then its constitutional
ghts have been invaded by an unconstitutional delegation of
gislative power.

III

The finding by the Commission that respondent is not an interurban is not in any wise binding upon the Court.

We have so far assumed that the trial court had a right dependently of the Commission to determine whether or ot the respondent is an interurban railroad, and we have own that the determination that it is an interurban railroad amply sustained by the evidence. However, the right of e trial court to make such a determination is challenged petitioners in this court for the first time upon a ground

never before asserted in the course of this case, namely, that the determination by the Commission is final, having been made after a hearing. (Brief, p. 37.) Heretofore it has been conceded by the petitioners that if the determination of the Commission is arbitrary, unreasonable, or not based upon sufficient evidence, it is not binding upon the courts. (See petitioners' pleading, R. 36.) They concede that even the cases they cite show also that it is not binding if it is contrary to and against law, and we think we have shown that it was, and likewise that it is necessarily arbitrary and not supported by the evidence. If the trial court was right in this, and we have shown that it was, then of course the trial court was likewise correct in its finding that respondent is an interurban railroad, and the judgment should be affirmed, unless this new proposition of petitioners is sustained, namely, that the determination by the Commission is binding upon the courts, whatever its character, whether it is arbitrary, capricious, not supported by substantial evidence, or contrary to or against law.

On the contrary, it is our position that the determination by the Commission is not binding absolutely as now argued by petitioners, or even to the limited extent heretofore contended for by them, but that the trial court had the right to try the status of the respondent as to being an interurban railroad independently of any finding by the Commission.

As frequently happens, the manner in which questions arise in a law suit is lost sight of in the course of arguing the questions involved. So it is here. Opposing counsel lose sight as to how the question as to the status of the respondent arises. Under the Railway Labor Act, the Interstate Commerce Commission only makes a finding, it does not, it is not even authorized to issue any order, and there is no order to attack, (*Shannahan vs. United States*, 303 *U. S.* 596), so that the provisions of the Interstate Commerce Act as to how orders of the Commission shall be reviewed are not applicable, nor would there ever be any reason for respondent to attack a finding of the Commission as such, for as a result of the finding itself it suffers no injury. But the Mediation Board has taken the position that respondent is not exempt from the Railway Labor Act and has ordered respondent to comply with its provisions, and respondent has failed and

refused. In consequence the United States District Attorney has threatened to prosecute respondent and its officers for that failure and refusal. This suit is to enjoin such prosecutions.

It is conceded that respondent was entitled to maintain the suit, because the irreparable injury and damage to it if compelled to act under the law is admitted—and therefore neither that, nor the evidence as to that, is in question here, so that the sole question is whether the court in such a suit is bound by the finding of the Commission that respondent is not an interurban electric railroad, either absolutely or within the limitations heretofore set out, or rather whether, if criminal actions were brought, would the court or the jury in such actions be precluded from determining independently the status of the respondent as to being an electric interurban railroad, or could it only determine whether the Commission had so found, or if it had so found, the finding of the Commission was arbitrary, not supported by the evidence or against law, and only in the event that it so determined could it *de novo* determine respondent's status?

In considering this question, it is to be borne in mind that at the same time the Railway Labor Act was enacted, three different statutes, to be administered by separate agencies, were enacted, the Railway Labor Act to be administered by the Mediation Board, the Railroad Retirement Act to be administered by the Railroad Retirement Board, and the Carriers Taxing Act to be administered by the Collector of Internal Revenue. Each contained precisely the same provisos excluding interurban railroads. The obvious reason for authorizing the Interstate Commerce Commission to determine whether an interurban railroad is exempted under the Act is that in the first instance these various agencies should not make different determinations with respect to the same railroad, which might well happen if each were to make the determination under the proviso itself, but it cannot be argued therefrom that there was any intention on the part of Congress to deprive the particular railroad of having its day in court to have its status passed upon by the courts in an appropriate case, else Congress would have said so. It is significant, indeed, that the Congress did not even specifically say that the determination by the

Interstate Commerce Commission would be binding on the three agencies operating under the three acts named, as it had specifically said in the Railway Mail Pay Act, which vested authority in the Commission to determine the rates of pay to railroads for carrying mail, and also provided that the Postmaster General should pay the rates of pay so determined. (U. S. C. A., Title 39, sections 541-566, especially 551.)

In petitioners' brief (p. 47), the statement is made that "When the Congress chose the Commission to make the determination, the inescapable inference is that it approved the principles which the Commission had followed in such cases." Why counsel should say that such conclusion follows we cannot conceive, because under the 1920 Act the Railway Labor Board had held that the extent of its freight revenues did not prevent a railroad from being an interurban, and yet neither at that time nor at any time thereafter was any complaint made of that decision. On the contrary, it was acquiesced in by everybody concerned. (Decision 33, R. 109.) Congress, then, presumably had before it knowledge of the Board's decision, when it enacted the Railway Labor Act of 1934, the one here in question. It likewise had knowledge of the insistent recommendations of the Interstate Commerce Commission that the exclusion provisions of the Interstate Commerce Act be changed, so as not to exempt electric interurban railroads engaged in the transportation of freight, and yet the exemption provision placed by Congress in the 1934 Act, so far as we are here concerned, is precisely like the one in the 1920 and 1926 Acts. How, then, can it be said that Congress intended that the term "interurban" should have the meaning ascribed to that term by the Commission, and that its interpretation should be binding on the courts; that it should have the effect of amending the law, notwithstanding the refusal of Congress to amend it? On the contrary, Congress had a right to assume that the Commission would not change the meaning of the term "interurban" in the teeth of the refusal of Congress to adopt the change suggested to it by the Commission.

Moreover, it is further significant that of the three Acts above referred to, the first Railroad Retirement Act and the Carriers Taxing Act were held to be unconstitutional

by the Supreme Court, and a new Railroad Retirement Act and a new Carriers Taxing Act were passed in June, 1937, and this was many months after the trial court in this case had granted the injunction and had squarely held against the test for determining what is an interurban, adopted in its later decisions by the Commission, notwithstanding the refusal of Congress to adopt the Commission's test, and had asserted the court's authority, notwithstanding the finding by the Commission, independently to determine the status of respondent as an interurban. Moreover, these new laws were enacted more than a year after a similar ruling had been made in the Texas Electric Railway case by the Federal District Court at Dallas, Texas, and yet precisely the same exclusion provisions as to interurbans were contained in these new laws as in the old ones. If Congress had intended either that the test advocated by the Commission in determining the question should be adopted, or that the determination of the Commission should be to any extent binding on the courts, it could easily have said so. At least the executive department of the Government, and the Interstate Commerce Commission, interested parties to this litigation in both courts, apparently made no effort to have the law changed, or if they did, Congress did not heed their efforts.

Petitioners have heretofore suggested (Petition for writ of certiorari, p. 14), that the effect of the court granting a trial *de novo* in such cases as this has resulted in paralysis of the plan established by Congress for the determination of which electric railroads are subject to the Railway Labor Act. Why? Why is the Government so alarmed that the citizen shall have his day in court, when an administrative body has determined his status to be different than he had ever conceived it to be? The same evidence can be introduced. Why should the Government fear to have the matter determined in court, unless it fears that its determination by the administrative body will not stand the light of day in a court of justice? But the Government should not only have no such fear of the courts, it should welcome an independent determination of the matter therein. If the finding of the administrative body is right, then presumably the court will on the same evidence introduced before it make the same finding. If not,

in a matter not merely regulating its business, but actually determining its status, the Government instead of resisting should welcome the determination by the court of the claim of the railroad company as a citizen that the administrative body had misconceived its status, to its disadvantage.

In support of the contention that the determination by the Commission of the status of respondent as to being or not being an interurban railroad is binding upon the Courts, petitioners argue that by virtue of the proviso the Commission, acting outside its regulatory capacity, is only authorized to determine a question of fact for the other executive agencies acting under the Railway Labor Act and the other Acts above referred to, and that such a finding of fact is not subject to review by the Courts. But the difficulty with the conclusion thus arrived at is that the determination of whether a particular railroad is an interurban railroad involves more than a mere question of fact. It involves, first, the meaning of the term as used in the Act, and, second, the determination as to whether the particular railroad is an interurban in accordance with that meaning. In other words, both a question of law and fact.

Moreover, the cases upon which petitioners rely do not support the proposition stated by petitioners. One case, *Great Northern Ry. Co. vs. United States*, 277 *U. S.* 172, decides no more than that the question decided in the other case (*Butte, Anaconda & Pacific Railway Company vs. United States*, 290 *U. S.* 127) was not properly brought in a three judge Court. The other case, *Butte, Anaconda & Pacific Railway Co. vs. United States, supra*, held that money paid by the United States to a railroad company pursuant to a certificate of the Interstate Commerce Commission under the provisions of Section 204 of the Transportation Act for the reimbursement of carriers operating their own lines may not be recovered back by the United States. The reason for the decision is that such section of the Act granted a bounty to those carriers coming within its purview, and Congress vested in the Interstate Commerce Commission the determination as to which carriers were entitled to the bounty and the amount thereof, which sum was to be paid by the Treasurer of the United States in accordance with a certificate or certificates issued by the Commission. Money had been

so paid to the Butte, Anaconda & Pacific Railroad and the United States sought to recover a portion of it back, because the Commission had subsequently to the issuing of the certificate determined that its first determination of the amount of the bounty to be donated to the carrier was incorrect. This Court denied recovery, because the determination made originally was binding alike upon the Government and upon the carrier; and not subject to review by the Courts. The case went further than is stated by petitioners, and held that neither questions of fact or of law arising in the determination by the Commission in that case could be reviewed by the Courts. This situation is clearly distinguishable from that involved herein. The Congress in the distribution of the bounty could have itself determined who should be the recipients thereof, or could choose any agency it pleased to determine that matter, and the Act contemplates, indeed provides such decision to be final; and it being wholly a matter between the Government and its citizens claiming to come within the purview of the statute granting the bounty, it does not constitute a matter for judicial cognizance. Such case is comparable to the cases relating to regulations of the executive departments which will later be referred to in this brief. By virtue of the statute here involved, if respondent comes within the Act certain duties and obligations are placed upon it. Such was not the case in the statute involved in the Butte case, *supra*. These duties and obligations respondent must perform if within the Act, or, failing to do so, it subjects itself to prosecutions in the Courts. It cannot be conceived, inasmuch as the statute here involved contemplates court proceedings, that Congress intended to make an administrative tribunal's determination binding upon the Courts in such proceedings, even though it could do so without violating the carrier's constitutional rights—a subject which has been and will later be considered in this brief.

Petitioners concede that even under this newly discovered theory that the determination by the Commission as to the status of respondent being conclusive upon the Courts that the Courts could determine whether "the decision was based upon evidence introduced at the hearing or whether the necessary requisites of a fair hearing were lacking." The line of demarcation, as thus stated, between this new proposition

and the contentions made by petitioners throughout the course of this case is slight, because if the Commission in arriving at its determination used as the only determinative test one which was not relevant, as it did when it held that the sole determinative factor is the relationship of respondent's freight business to its passenger business, respondent did not have a fair hearing, and the decision is as if based upon no evidence at all. Likewise it was arbitrary and against law.

It is obvious that petitioners do not greatly rely upon this new proposition, but, as they say, rely primarily upon the proposition that the determination by the Commission is binding upon the Courts unless arbitrary, capricious, or not based upon substantial evidence.

Petitioners cite a number of cases which they claim support the proposition that the determination of the Commission is binding upon the Courts unless arbitrary, capricious or not supported by substantial evidence. (Note 6, Page 19, of petitioners' brief.) In each of the cases cited, however, it will be found that the statute provided the effect which the decision of the Interstate Commerce Commission, in litigation based upon such decision, had upon the scope of review by the Courts. It is not our contention that the Congress may not limit the right of review in cases involving civil liabilities or civil rights by providing that the decision of any administrative body shall, in a proceeding before the Courts, have a certain effect, but we say that Congress did not do so in this statute, and, not having done so, it has no effect, and the Courts have a right to determine the issues of law and of fact as in any other case. All of the cases cited upon this point involved suits brought to restrain or set aside orders of the Commission purporting to have been made pursuant to the authority vested in it by the Interstate Commerce Act. But Congress, by express enactment, has provided the effect to be given to an order of the Commission, because it has said (Section 16(12) of the Interstate Commerce Act) that in a suit for the enforcement of the order the sole question for review is whether it was "regularly made and duly served," and of course in an action to restrain its enforcement the same effect must be given it. This accounts for the language quoted by petitioners in their brief at Page

from *Virginian Ry. Co. vs. United States*, 272 *U. S.* 658, it it is not applicable herein where no such effect is given the Railway Labor Act to the determination by the ommission. It also explains the language quoted by petiioners from *United States vs. Louisville & Nashville R. R. o.*, 235 *U. S.* 314. In that case the Court said:

> "And the amendments by which it came to pass that the findings of the Commission were made not merely prima facie but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois Central and other cases, supra, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below."

he limitations referred to in the foregoing opinion are found the case of *Interstate Commerce Commission vs. Louisville Nashville R. R. Co.*, 227 *U. S.* 88, which is one of the cases hich the Court in the foregoing opinion expressly referred . In this latter case the Court said:

> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was

> inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (citing cases), or if the facts found do not, as a matter of law, support the order made (citing cases)."
>
> "* * * * * But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power."

As pointed out in the foregoing quotations, the statute therein involved made the findings of the Commission conclusively correct in case of judicial review, except to the extent pointed out. And yet with full knowledge of the fact that it had been necessary, in order to give any effect of conclusiveness to the Commission's findings under other statutes, so to expressly provide, Congress, in enacting the Railway Labor Act, did not provide that the determination of the Interstate Commerce Commission, as to whether or not a particular railway came within the Act, was conclusive upon the Courts to any extent. It is obvious, from this failure on the part of Congress so to make the determination of the Commission binding, that it did not intend that it should be.

The case of *Swayne & Hoyt, Ltd. vs. United States*, 300 *U. S.* 297, cited in note 7, page 19, of petitioners' brief, arose under the Shipping Act. That Act contains the provision, U. S. C. A., Title 46, section 828, that if the court determines the order of the board to have been "regularly made" and duly issued, it shall enforce obedience there .

The cases of *St. Joseph Stock Yards Co. vs. United States*, 298 *U. S.* 38, *Acker vs. United States*, 298 *U. S.* 426, and *Morgan vs. United States*, 298 *U. S.* 468, cited in the same note, are cases arising under the Packers and Stockyards Act. Again we find a provision in the Packers and Stockyards Act relating to enforcement of the Secretary's orders and findings. It is U. S. C. A., Title 7, section 216, and reads as follows:

> "* * * If after hearing the (district) court determines that the order (of the Secretary) was lawfully made and duly served and that such person is

in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives, from further disobedience to such order, or to enjoin upon him or them obedience to the same."

It may therefore be said that the Supreme Court has never held that a finding or order of an *administrative body* is conclusive upon the courts, if based upon substantial evidence, is not arbitrary, or contrary to and against law, except in those cases arising under statutory provisions, which expressly limit the courts' right of review. There is, however, a line of cases, claimed by petitioners to sustain their contention, of which the cases of *Houston vs. St. Louis Independent Packing Co.*, 249 *U. S.* 479, *Decatur vs. Paulding*, 14 *Pet.* 497, *Bates & Guild Co. vs. Payne*, 194 *U. S.* 106, *Riverside Oil Co. vs. Hitchcock* 190 *U. S.* 316, and *Tang Tun vs. Edsell*, 223 *U. S.* 673, which cases are referred to at page 19, note 7, petitioners' brief, are examples. These cases hold that regulations of an *executive department* will not be disturbed, if made in conformity with law, except within the limitations hereinbefore set out. There is a reason for such holding which is apparent, and which is not applicable to the case at bar. U. S. C. A., Title 5, section 22, provides as follows:

"The head of each executive department is authorized to prescribe regulations, not inconsistent with law, for the government of his department * * * ."

The executive departments in such statute referred to are defined in Section 2 of the same title, as being the departments under the control of the members of the President's cabinet. So when the provision refers to "the head of each executive department," it refers to the various cabinet members. The courts, in a long line of cases, have held that such a regulation by the head of an executive department, when not inconsistent with law, has the force of a law (*Caha vs. United States*, 152 *U. S.* 221; *Ex parte Reed*, 100 *U. S.* 13), and that a regulation by an executive department head, in conformity to a particular act of Congress, becomes a part of the law, and of as binding force as if incorporated

in the body of the law itself. *Wilkins vs. United States*, 96 *Fed.* 839, *United States vs. Sibray*, 178 *Fed.* 144, *United States vs. Barrows*, 1 *Abb. U. S.* 351, *In re Aliens*, 231 *Fed.* 335, *Peterson vs. United States*, 287 *Fed.* 17. It may appear to the casual reader that the statute herein referred to applies only to the relation existing between the executive head and his immediate employes, but an examination of the cases herein cited discloses that such is not the case. The courts have interpreted such statutory provision as applying to the enforcement and operation of laws of Congress, the enforcement and operation of which is directed to a particular executive department. Thus the regulations of the Secretary of Agriculture made in conformity with the Meat Inspection Act are given the force of law and become a part of the law, as if incorporated in the Meat Inspection Act itself. With this in mind, let us turn for example to a consideration of the case of *Houston vs. St. Louis Independent Packing Co.*, 249 *U. S.* 479, relied upon by petitioners. In that case, pursuant to the authority given him by the Meat Inspection Act, the Secretary of Agriculture made a regulation as to what could be called sausage, and ruled that if the product contained more than five per cent cereal and water, it could not be labeled sausage, as the name was deceptive of the product. This was a regulation by the head of an executive department, and under the law and the interpretation heretofore given it by the courts, this regulation became as much a part of the Meat Inspection Act as though incorporated in the Act by Congress itself. As such regulation has the force of law, the courts of course cannot inquire into the facts upon which the Secretary based his regulation, except within the limitations hereinbefore set out. As stated by Justice Clark:

> "* * * and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it."

It might be parenthetically noted that there is another distinction between the determination of the Secretary of Agriculture as to what is sausage, and the determination of the Interstate Commerce Commission as to what is an interurban. In the former, Congress had never manifested its

conclusion that a product might contain more than five per cent cereal and water and still be sausage, while in the latter, Congress on numerous occasions has determined that a carrier might obtain more than fifty per cent of its operating revenue from freight traffic and still be an interurban. In other words, Congress had never legislated on the subject as to what might be sausage, while it has legislated as to what might be an interurban. The courts have consistently held that regulations must be consistent with law, and that they may not be extended so as to alter, amend, or defeat a law already enacted by Congress. (*Morrill vs. Jones*, 106 *U. S.* 466, *Campbell vs. United States*, 107 *U. S.* 407, *Williamson vs. United States*, 207 *U. S.* 425, *United States vs. Symonds*, 120 *U. S.* 46, *Sherlock vs. United States*, 43 *C. Cl.* 161), and that a regulation may supplement a statute, but cannot supersede it, (*Roberts vs. United States*, 44 *C. Cl.* 411). So here the Commission cannot find that an interurban electric railway is not that which Congress has already expressly said that it is. Congress, as we have heretofore shown, has expressly stated that an interurban railway may still be an interurban notwithstanding the relation of the quantity of its freight business to its passenger business or the revenue derived from freight business as compared with passenger business. Therefore, a finding by the Commission that respondent is not an interurban, because it engages in interstate freight traffic and because a large portion of its operating revenue is derived from freight traffic, is a finding that seeks to supersede and defeat legislative enactments on the same subject matter.

The origin of the doctrine that discretionary regulations by the heads of executive departments will not be reviewed by the courts, when supported by substantial evidence, is found in the case of *Kendell vs. United States*, 12 *Peters*, 524. In that case, the court pointed out the distinction between reviewing a purely ministerial act, and a duty imposed upon the head of an executive department, in which judgment and discretion are to be exercised. The former is subject to review, the latter is not.

See also the case of *Decatur vs. Paulding*, 14 *Pet.* 497, cited at page 19, note 7, of petitioners' brief. Therein the court said:

"We have referred to these passages in the opinion given by the court in the case of *Kendall* vs. *United States*, in order to show more clearly the distinction taken between a mere ministerial act, required to be done by the head of an executive department, and a duty imposed upon him in his official character as head of such department, in which judgment and discretion are to be exercised. There was in that case a difference of opinion in the court in relation to the power of the Circuit Court to issue the mandamus. But there was no difference of opinion respecting the act to be done. The court was unanimously of opinion that in its character the act was ministerial. In the case before us, it is clearly otherwise; and the resolution in favor of Mrs. Decatur imposed a duty upon the Secretary of Navy, which required the exercise of judgment and discretion; and in such a case the Circuit Court had no right, by mandamus, to control his judgment, and guide him in the exercise of a discretion which the law had confided in him."

The basis for the distinction is found in the elementary foundations of our form of government—that there are three distinct and separate branches thereof, the Executive, the Legislative, and the Judicial—and that there can be no conflict in the powers exercised by each. When the head of an executive department is vested with authority to make regulations, there is necessarily, from the nature of our governmental system, implied the limitations upon the power of the courts to review his exercise of that authority. In the case of *Houston vs. St. Joseph Independent Packing Co.*, supra, the head of an executive department was charged with the duty of making regulations which required the exercise of judgment and discretion—a duty that was executive in character—the court very properly refused to review the exercise of such judgment and discretion.

But there is an important distinction between the finding of an administrative board, such as the Interstate Commerce Commission, even though it requires the exercise of judgment and discretion, and a regulation made by the head

of an executive department, which requires the exercise of judgment and discretion. The latter have been held by the courts to have the "force of laws"; the former have never been so held.

So, while the courts have consistently refused to review the exercise of judgment by the heads of executive departments, no case has come to our attention in which the court has refused to try de novo the findings or orders of administrative boards, except in those cases in which there was special statutory limitation on the court's right of review. Such statutory limitation is lacking in the Railway Labor Act; and indeed the fact that in all the statutes cited Congress has deemed it necessary expressly to limit the authority of the courts, and yet did not do so in the Railway Labor Act, clearly evidences that Congress did not intend to so limit the courts' authority, and there is good reason for the difference, it is the difference between the mere regulation of a citizen's business and the determination of his actual status.

Having disposed of the cases cited by petitioners claimed by them to be contrary, we proceed to show why it was and is our contention that it was the right and duty of the court independently to determine whether or not the respondent is an electric interurban railroad not subject to the act. First. If the criminal prosecutions which had been threatened had actually been brought, there would be two questions for the court, or the court and jury to determine. First, whether or not the respondent is a carrier subject to the act, and secondly, if it should be held that it is, then, whether or not it had posted the notices as required by the act, both questions being essential to the determination of respondent's guilt, and there being no dispute but that the respondent had failed to post the notices, there would be only the first question to determine. Inasmuch as this suit is brought to prevent such prosecutions, there is left only the first question, and obviously that question must be determined upon the same basis as it would be determined in the criminal action. It will be observed from a reading of the provisions of the act that the authority and duty of the District Attorney to prosecute is not dependent upon any action or determination by any administrative body or tribunal; he could pro-

ceed to prosecute even if no such determination had been made; and, therefore, necessarily the determination whether or not respondent is a carrier within the act, both in the threatened criminal actions and in this suit to prevent them, must be an independent determination. Moreover, if it were held otherwise, the respondent would be deprived of its constitutional rights guaranteed under the Fifth and Sixth Amendments of the Constitution of the United States, for if an administrative tribunal is empowered to determine one of the elements necessary to constitute the criminal offense in a proceeding in no way connected with the action in which the guilt of the accused is to be determined, and that determination is to be conclusive on the accused in his trial, then and by virtue of that fact his constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States have been taken from him, and the same rule with respect to this matter must be followed in a suit to enjoin a criminal prosecution as in the criminal prosecution itself. Therefore it is the contention of the respondent, that as one of the elements of his guilt cannot be determined against him in a proceeding other than that in which his guilt or innocence is being determined, one of the elements necessary to prosecution under the act, to wit, respondent's status as a carrier within the act, cannot be determined against him in a proceeding other than that in which his injunctive relief is being sought.

For the first time in this case the contention is now made that the determination of the Interstate Commerce Commission is binding no matter how arbitrary, capricious, or without substantial evidence to support it such determination may be. The mere statement of the claim is its own refutation, for it cannot be under our American system, that in a criminal action in which the liberty and property of the citizen is in jeopardy, the status of the citizen, which is the only issue in the case, is determined, not by evidence produced against him at the trial, but by the determination of an administrative body, which in this case is the Interstate Commerce Commission, and there is nothing left, if that determination is final, but for the court to pronounce judgment against him. While not quite so shocking, the claim that the determination by the Interstate

Commerce Commission is binding unless arbitrary, capricious, or contrary to law is also untenable, because it has the effect, though less drastically, of depriving respondent of its constitutional rights.

Second. The Circuit Court of Appeals, speaking through Judges Lewis and Williams, interpreted the authority given to the Comm. sion under the Act as being limited to a determination as to whether electric lines are operating as a part, or are a part, of a or the general-steam railroad system of transportation. The petitioners in their brief (Page 22) take issue with this interpretation of the extent of the Commission's authority, and declare that if the Commission is to determine which electric lines fall within the terms of the proviso, it must first determine whether such electric lines are street, suburban or interurban. In making this declaration, petitioners misconstrue the general office of a proviso and the effect of this particular proviso. In *Deitch vs. Staub* (*6th Cir.*), 115 *Fed.* 309, Circuit Judge Lurton, later one of the Justices of this Court, said:

> "* * * * * * The primary and usual office of a proviso is to except something out of a statute which would otherwise be within it. Its use is to take special instances out of a general class. Suth. St. Const. Section 222, 223; *Gibbons vs. Ogden*, 9 *Wheat.* 191, 6 *L. Ed.* 23. * * * * *"

This is undoubtedly a correct interpretation of the general purpose of a proviso, that is, to take special instances out of a general class; in other words, an exception clause. In the Railway Labor Act street, interurban or suburban electric railways are, as a general class, not subject to the Act. It is only in special instances that such electric railways become subject to the Act—when they are operating as a part, or are a part, of a or the general steam-railroad system of transportation. The proviso, therefore, removes from the general class of excluded electric railways those that are operating as a part, or are a part, of a or the general steam-railroad system of transportation. In other words, certain types of the general class of excluded railroads are included within the Act by the proviso, and Congress, in granting to the Commission authority to determine which electric

lines fall within the terms of the proviso, did not confer upon the Commission the authority to determine which electric lines are excluded from the Act, but only to determine which of the general class of excluded railways are included within the Act by the proviso. Street, suburban and interurban electric railways being the general class excluded by the Act, the authority of the Commission is to determine which of the various street, suburban and interurban electric railways come within the terms of the proviso.

As Circuit Judge Williams succinctly stated the matter:

> "The inclusion of 'any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power' and the confining of the Interstate Commerce Commission to determine 'after hearing' as to whether 'any line operated by electric power falls within the terms of this proviso,' restricts the Commission to the determination whether the Utah Idaho Central Railroad Company, a street, interurban or suburban electric railway, was operated as a part of a general steam-railroad system of transportation."

It was and is conceded that the Utah-Idaho Central Railroad was not and is not a part of a or the general steam-railroad system of transportation, and this concession by the Commission left nothing for it to determine, for by the express terms of the Act its authority was limited to the determination of that which it had conceded.

Third. The Congress has not manifested its intention that the determination of the Interstate Commerce Commission shall be binding upon the courts, even if it was not arbitrary, or capricious, or if not supported by substantial evidence. No case is cited by petitioners which holds that in a criminal case the finding of any administrative body is binding upon the court, and, as heretofore pointed out, in the very nature of things, no such holding could be made, nor any case which holds that in a suit to restrain prosecutions under a criminal statute any finding of an administrative tribunal as to the status of the respondent is binding in any way upon the court.

Petitioners do, however, on page 37 of their brief, in commenting on respondent's claim that the Fifth and Sixth Amendments of the Constitution are violated if the Commission's finding of respondent's status is binding in this type of action, make the bald assertion that "this is plainly not the law," and in support of that assertion they cite two cases, *United States vs. Grimaud*, 220 *U. S.* 506, and *Houston vs. St. Louis Independent Packing Company*, 249 *U. S.* 479. No valid reason is apparent to respondent why petitioners cite these two cases in support of their contention that "this is plainly not the law," because those two cases do not support the statement, nor do they have any bearing thereon. In the first of the two cases, the defendants demurred to an indictment charging them with grazing sheep on the Sierra Forest Reserve without a permit as required by the regulations adopted by the Secretary of Agriculture upon the ground that the forest reserve act was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make rules and regulations, and made violations thereof a penal offense. All this Court held in that case was that the act was constitutional, not that all of the elements going to make up the crime would not have to be found by the Court or jury in the trial. The second case above cited decides nothing more than that a regulation by the Secretary of Agriculture that sausage containing more than 5 per cent cereal and water could not be labeled such as it was deceptive of the product, would not be reviewed by the court. This case is fully considered by respondent elsewhere in this brief.

The following language from petitioners' brief (page 29) is particularly interesting:

> "Deliberately omitted from that list of authorities were cases arising under such statutes as the Federal Trade Commission Act and the National Labor Relations Act, which provide specifically that the findings of the administrative body shall be conclusive if supported by evidence."

The inclusion of such provisions in those two acts conclusively demonstrates that Congress recognizes that the findings of administrative bodies are not binding upon the Courts unless the statute expressly so makes them, and where it

is the desire and intention of Congress that such findings shall be conclusive upon the Courts it has expressly so provided in the various statutes. But, on the contrary, in the Railway Labor Act, the Congress, for the reasons hereinbefore stated, has clearly manifested its intention that the determination by the Commission should be in no wise binding upon the Courts.

An examination of the details of the Railway Labor Act itself will further disclose that it could not have been the intention of Congress to bring the respondent within its terms. For instance, the National Railroad Adjustment Board shall "consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen of whom by such labor organizations of the employees national in scope, as have been or may be organized in accordance with the provisions of section 152 of this Chapter." (Section 3, First (a).) Obviously, the Congress could not have intended that respondent, whose service in the territory served is primarily local, not only in its passenger, but in its freight service, a carrier not a part of any steam railroad system of transportation, much less a part of the general steam railroad system even in its broadest sense, a carrier not even considered necessary to the operations of the Government in time of war so as to come within the Federal Control Act, should be subject to the same regulations as to the employment of its employes as that applicable to the major carriers which do form a part of the general steam transportation system of the country (using that term in its broadest sense) and under a plan or scheme, in which neither its voice or the voice of its employes would be in any wise vocal, and especially when, as shown here, prior to the enactment of the law, its employes were never organized in any union or brotherhood of railroad employes "national in scope," but were organized as a local unit of a union distinct and separate, and with which it had never had any labor disputes.

Fourth. That in the absence of express limitations, the courts have authority to try de novo the question as to the status of the respondent, without regard to the finding by any administrative body, is no longer an open question, because in a series of cases precisely analagous this court has so held.

The petitioners, at page 24 of their brief, concede that in the cases of *Piedmont & Northern Ry. Co. vs. Interstate Commerce Commission, supra,* and *United States vs. Chicago North Shore & Milwaukee R. Co., supra,* this court decided for itself independently whether particular carriers were interurban railways, and in the case of *United States vs. Idaho,* 298 *U. S.* 105, this court decided the analagous question of whether a particular line constituted a spur track. It is claimed, however, that these cases are not applicable to the case at bar, for the reason that the provisions of the Interstate Commerce Act under which they arose did not specifically authorize the Commission to make the determination as to which carrier fell within their terms, and that is the only contention made as to the inapplicability of these cases to the matter in issue herein. Such contention is obviously based upon an erroneous interpretation of the provisions of the Act. The Piedmont case arose under the provisions of the Transportation Act, requiring that a certificate of convenience and necessity be obtained by a carrier subject to the provisions of the Act from the Interstate Commerce Commission, before embarking upon any extension of its lines. As heretofore pointed out, the Act specifically exempted from the provisions street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam-railroad system of transportation. The Piedmont & Northern Ry. Co. made application to the Commission for such a certificate, such application being made without prejudice to its making claim that it was exempt as an interurban. The Commission found the railway not an interurban, overruled the claim of exemption, and denied the certificate upon the merits. Thereafter, the Piedmont commenced construction of the extensions and the Commission brought injunctive proceedings in the District Court, alleging that the construction was illegal, as no certificate had been obtained. The railway defended upon the ground that it was an interurban. The trial court over-ruled the defense and enjoined the construction, until a certificate had been obtained from the Commission. The railway appealed to the Circuit Court, but this court granted certiorari prior to the hearing by the Circuit Court.

The Act gave the Commission the exclusive power to issue such certificates, but was silent with respect to its

authority to determine what carriers were subject to the Act. It is obvious, however, that while the Act is silent as to that, it nevertheless granted such authority to the Commission as effectively as if the grant had been in express words. The Act excluded certain types of interurbans (those operated as a part of a general steam-railroad system of transportation) from its operations. Under it, when the railway made application for a certificate, the Commission first had to determine if the railway came within the Act. Inasmuch as it was necessary to make this determination as preliminary to the determination as to whether to issue the certificate, the authority must be read into the statute as conclusively as though it was therein expressly stated.

The same is true of the case of *United States vs. Idaho*, supra, wherein the railroad applied for a certificate for the abandonment of a line of track. Under the Act, there could be abandonment of the line if it was a spur, so again it was necessary for the Commission to determine the preliminary question as to whether the line was a spur, before proceeding to hear the application for abandonment on the merits. As it was essential that this preliminary question be first disposed of, before the Commission could proceed to exercise the power expressly granted, the power to determine such preliminary matter must be read into the express grant to the Commission.

The case of the *United States vs. Chicago, North Shore & Milwaukee R. Co., supra,* arose under Section 20a of the Transportation Act, and required all carriers to obtain a permit from the Interstate Commerce Commission before issuing any securities, but specifically exempted interurban, street, or suburban railways, which are not operated as a part of a general steam-railroad system, from the requirement. Action was brought by the Commission to enjoin the railroad from issuing securities, without first having obtained from the Commission an order permitting it so to do. Here again, the authority of the Commission to determine whether the particular carrier was an interurban exempt from the Act was not expressly given, but again it was necessary for the Commission to pass upon that question before passing upon the application for a permit on the merits. So such authority was by the Act, by necessary implication,

conferred upon the Commission, though not expressly so stated in the Act.

There is no difference in the situation under the Railway Labor Act, notwithstanding the contentions of petitioners to the contrary. They say that there is, because the status of the railroad is determined under that Act by an independent administrative body, to wit, the Interstate Commerce Commission, rather than by the body administering the Act, to wit, the Mediation Board. From this they draw the conclusion that if determination were by the Mediation Board, it would be subject to review by the courts, as it was when the Interstate Commerce Commission decided its own jurisdiction in the Piedmont, North Shore and Idaho cases. The inference is that when an administrative body determines its own jurisdiction, it is conclusively presumed to be prejudiced in making such determination and therefore subject to review, whereas if the determination is by an independent administrative body it is not and therefore binding. There is, however, no basis for any such presumption. The first question every tribunal has to determine is whether it has jurisdiction to determine the cause. This, we undertake to say, is the first time it has even been suggested that the question as to the tribunal's jurisdiction to determine the matter before it should be determined by an independent tribunal, which would then be binding upon it.

Moreover, it is not made mandatory by the Railway Labor Act that the Interstate Commerce Commission determine the status of an electric line as to being within the Act. It must do so on request either of the Mediation Board or upon complaint of any party interested. Suppose no request is made. Then the Mediation Board must determine the matter. Then petitioners concede that determination would be subject to review. So that we have this anomalous situation, that if the determination is made by the Mediation Board (there having been no request for any determination to the Interstate Commerce Commission) that a particular railroad is not an interurban railroad, that decision is subject to review. But if, as to another railroad, a request has been made to the Interstate Commerce Commission, and as a result of such request it has determined the railroad's status as to being an interurban railroad, that determination

is binding. This is a complete refutation of petitioners' argument that the respondent herein has sought collaterally to attack the determination of the Commission. It is no more a collateral attack in this case than was the attack made in the Idaho, North Shore and Piedmont cases.

Finally, the contention of petitioners can be reduced to an absurdity, if there are enough administrative bodies to determine all the questions of fact in the matter, and if not, enough could be created. Here there are, as we have pointed out, only two questions before the court, if the District Attorney should bring the prosecution under the Act, (1) Is respondent a carrier within the Act? and (2) Has it failed to post the notice required thereby? Petitioners say that the first has been determined by an independent administrative body and that determination is binding on the court. Then let the other be determined either by the same independent administrative body or some other. Then all the court would have to do would be to instruct the jury that it was their duty to find the carrier guilty.

Fifth. The question as to whether an electric line is a carrier within the Act is a mixed question of law and fact in any particular case, because the first question in the matter which must be decided is: "What is the meaning of the term 'interurban' as used by the Congress in enacting the statute?" and comes squarely within the principle announced by this court through Justice Brandeis in the Idaho case, wherein he says: "Whether certain trackage is a 'spur' is a mixed question of fact and law, left by Congress to the decision by a court—not to the determination of either a federal or a state commission." Surely, if the determination as to whether certain trackage constitutes a spur is a mixed question of law and fact, then the question of whether an electric railroad is an interurban certainly is.

That this is so is emphasized by the present situation. Since this case was tried, the Social Security Act has been enacted, and it is certain that the respondent comes within one or the other of the two Acts, the Railroad Retirement Act, which contains precisely the same proviso as the Railway Labor Act, or the Social Security Act, so that necessarily there is involved herein the determination as to which of these Acts the respondent is under, for if it is under the

ilway Labor Act it is necessarily under the Railroad Re-ement Act, and if it is not, then it is under the Social curity Act, and the respondent is in the position of being bject to the separate demands of the agency administering ch Act that it comply therewith. The question as to which t is applicable to respondent, the more burdensome Railroad tirement Act, or the less burdensome Social Security Act, pends upon the meaning of the term "interurban" as ed by Congress, and if the respondent is held not to be an terurban railroad, the consequence is that it has also to bear e burdens of the Railway Labor Act, which it is conceded cannot bear and continue to exist.

Surely the determination as to which Federal Statute verns respondent is a matter of judicial cognizance and cision.

It is indespensable that it be first determined that the spondent comes within the proviso of the Railway Labor t before the Mediation Board has any authority to enforce as to the respondent, and that depends on whether it is an terurban, and that, in turn, depends on what is the meaning that term as used in the statute. We have heretofore id that the determination as to the status of respondent as being or not being an interurban involves a mixed question law and fact, but however it may be denominated, it is bject to judicial cognizance. If it is a mixed question of w and fact the authorities are conclusive that the Courts ve a right to determine it de novo, as shown by the Pied-ont, North Shore, and Idaho cases, *supra,* but even if it not so considered, but be only a question of fact upon which e applicability of the statute depends, it still is subject ther to examination de novo, or at least to review, and a ll in equity is an appropriate remedy. *Crowell vs. Benson,* 5 U. S. 22. The difference as to whether the matter is bject to examination de novo, or only to review, involves ly the question of whether the Court may consider new idence, or whether its determination shall be upon the cord made before the Commission, which, as we have inted out, is immaterial in this case, because the evidence fore the Commission, and the evidence before the Court, to the status of respondent was substantially the same. Page 11, brief of Petitioners.)

Sixth, should it be held that although it is not shown that Congress has in any manner manifested an intention that the finding by the Interstate Commerce Commission that respondent is not an interurban electric railroad should be binding upon the courts in any case, if that finding is not arbitrary, not supported by the evidence or contrary to and against law, nevertheless that it is in the ordinary case binding within those limitations, it is our contention that it is not binding in a case in which the Act under which it is made is attacked as to its constitutionality, as in this case.

The amended bill of complaint in this case alleged, as heretofore pointed out, that respondent is an electric interurban railroad and exempt from the provisions of the Railway Labor Act, but it is also alleged that the District Attorney claimed that notwithstanding respondent is an electric interurban railroad exempted by the Act, it is not entitled to make that claim, because the Interstate Commerce Commission has determined that respondent is not an interurban electric railroad, and has threatened to prosecute respondent and its officers for failing to comply with the Act, and that if said determination is to be construed to be binding upon it, such determination deprives respondent of its constitutional rights, because the authority to make such a binding determination is an unconstitutional delegation of legislative power, in violation of the Fifth Amendment to the Constitution of the United States and deprives respondent of its constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States, and further that even if the respondent should be held not to be an interurban electric railroad and within the Act, the Act itself is unconstitutional, in the particulars set out in said complaint (R. 17, 29). In other words, this suit is grounded upon the proposition that respondent is an interurban electric railroad exempt from the provisions of the Railway Labor Act, because it claims that it is in fact such a railroad; that notwithstanding it claims that in fact it is such a railroad the District Attorney claims that Congress has vested in the Interstate Commerce Commission authority to determine respondent's status in that regard, and pursuant to that authority the Commission has determined that respondent is not an interurban railroad, and that finding is binding upon respondent; that if such finding is construed to be binding, then it violates respondent's constitutional

rights, as above stated,—this being an attack upon one particular phase of the Act applicable only to respondent and interurban railroads similarly situated, and further the Act as a whole and in certain particular sections thereof is unconstitutional, this being a general attack applicable to all railroads, whether interurban or not.

The first question that arises under such a pleading, at the trial is: "Which proposition will the court determine first, whether respondent is exempt from the provisions of the Act, or whether it is unconstitutional under the special or general attack upon the constitutionality of the Act?" The answer to this question is not difficult, either upon principle or authority. Manifestly a court should not determine the constitutionality of a legislative act, either National or State, unless it is necessary to make the determination. If exemption from its provisions is claimed by respondent, the court will determine that question first, because if respondent is exempt, there will be no necessity for the determination of the constitutionality of the Act, either those provisions especially applicable to respondent and those similarly situated, or applicable to all who are held to come within its purview, and it is only in the event that the claim of exemption is denied that it will become necessary to determine the constitutional questions. *Lee, Comptroller vs. Bichell et al*, 292 *U. S.* 415. *Blair vs. United States*, 250 *U. S.* 273, *Siler vs. Louisville & N. R. Co.*, 213 *U. S.* 175, *Modern Woodmen of the World vs. Casados*, 15 *Fed. Supp.* 483.

Now, in taking the first step, in determining the first question, in determining the question as to whether respondent comes within the purview of the Act, there will ordinarily be no more difficulty than in determining any other question of fact or law, and it may be either. But where, as in this case, the claim is asserted that the court is not free to determine whether respondent comes within the Act, because that matter has been determined by an administrative body pursuant to legislative authority, and that determination is binding upon the court, a preliminary question arises, namely: Can the finding bind the court when it is engaged in determining a preliminary question necessary to be determined in the exercise of its jurisdiction to determine whether it

will pass on constitutional questions, though it may be binding in other cases? We are not here dealing with the question which we have heretofore discussed, namely, whether a finding is binding, notwithstanding Congress has not made it binding. We are assuming that it is ordinarily binding, either because Congress has specifically or by necessary implication said it is binding, or else that it is held that such manifestation of intention is unnecessary. Nor are we dealing with the question, heretofore considered, namely, as to whether such finding is arbitrary, not supported by the evidence, or contrary to and against law. We are assuming that the finding is not subject to those objections, which apply in all cases; we are assuming that it is binding ordinarily, but is it binding in this class of case, that is, in a case involving constitutional rights of liberty or property? This is the precise question which arose in the case of *St. Joseph Stockyards Co. vs. United States, supra.* In that case, Chief Justice Hughes, speaking for the majority of the court, holds that in such a case such a finding is not binding (p. 51). Mr. Justice Brandeis, though he concurs in the result, differs with the majority on this point, although agreeing that if a constitutional question involving liberty is raised, as is the case here, the rule would govern. Justice Cardoza (with whom Justice Stone concurs) agrees with the majority, but only on the ground of stare decisis, so that the rule announced by the majority in that case is the law, and therefore in a case involving the rights of liberty or property, the finding of an administrative body of any fact necessary to be determined is not binding upon the court, and none of the cases cited on page 34 of petitioners' brief are to the contrary.

It is undoubtedly true that the rule is subject to certain limitations. One is that the constitutional questions are properly raised by the pleading, but no question is made by either petitioners that they are not so pleaded in this case. The other is that the constitutional questions are brought into the case in good faith, and no claim has ever been asserted by petitioners that they are not in this case. Indeed an examination of the record before the Interstate Commerce Commission would disclose that that question was raised at the hearing before the Examiner at the very outset. So, under this rule, the court in this case was not bound by the finding of the Interstate Commerce Commission, even if

was not, as he found it was, contrary to and against law, nd the court's finding ought not to be disturbed, even though be held that he was wrong in finding that the finding of e Commission was contrary to and against law, and can nly be disturbed if his finding is not supported by the vidence, but we think we have shown conclusively it was.

The court having found that respondent is an interurban ilroad and not within the Act, and therefore that it is unecessary to determine the constitutional questions raised ither by the special or general attack upon the Act, the ext question is: "What shall the court do?" And, of course, e answer is that having properly acquired jurisdiction of e cause, the court will proceed to its final determination, nd that is true even when because of the finding it develops at no Federal question is involved, which is not the case ere, because here a Federal statute is involved.

The cases heretofore cited under this heading sustain ll of the points herein made, but the case of *Modern Woodmen of America vs. Casados, supra,* is particularly in point. n that case, the plaintiff in its pleadings claimed that it as a fraternal insurance society and as such exempt from statute of New Mexico imposing a tax upon insurance remiums, that the state tax commissioner claimed that it as not exempt and was threatening to subject it to the heavy enalties provided in the Act, and to revoke its license for ailure to pay the tax, but that if it were not exempt then at the State Act violated certain provisions of the Federal onstitution. The only claim made by the defendant in e case as to the applicability of the statutes on a motion to ismiss the bill was that the plaintiff was in fact an ordinary nsurance company, but masquerading as a fraternal society, being admitted that fraternal societies were exempt under e statute. The court determined from an examination of e allegations of the bill that the plaintiff was a fraternal ociety, exempt under the statute. It declined to pass upon e constitutional questions involved and enjoined the colection of the tax. Except that the statute which was under ttack in that case was a State and not a Federal statute, hich of course makes no difference, and except that in that se the finding by an administrative body was not involved, hich makes no difference, because that matter is governed

by the rule announced by Chief Justice Hughes, the case is precisely like this case.

So there can be no doubt the trial court was not only justified in finding, but it was his duty to find independently upon the question whether respondent is an interurban railroad.

But it is suggested that this Court in the case of *Virginian Ry. Co. vs. System Federation No.* 40, 300 U. S. 515, since the decision in this case by the trial court, has decided that the Railway Labor Act here in question is constitutional and therefore that there is now no constitutional question involved in this case. Even were that the case to the fullest extent, it would make no difference, because in determining whether in a case there are constitutional questions involved, so as to enable the trial court independently to determine the facts necessary to decide them, does not depend upon whether they would, when reached, be determined in favor of respondent, but whether they are raised in good faith, and we have shown in this case that they were. But in the Virginian Ry. case, supra, the constitutional questions herein raised were not determined, because the Virginian Railway was not an electric line, and these questions are still in this case. We still insist, then, that there are certain constitutional questions respecting the law which were not involved in the above case, and which respondent or any electric interurban railroad may raise, and these we have raised and still do raise. (See pages 73, 74 and 98 of this brief.)

CONCLUSION

We respectfully submit that from whatever standpoint this case may be viewed, the judgment of the Circuit Court of Appeals should be affirmed.

J. H. DeVINE,
J. A. HOWELL,
Counsel for Respondent.

DAVID L. STINE, and
NEIL R. OLMSTEAD,
Of Counsel.